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ABSTRACT

This book is composed of the presentations delivered at the 1988 School Law Seminar. Experienced attorneys presented topics covering a wide range of current issues, all vital to competent legal representation of public school boards. The following articles are included: (1) "Secular Humanism and the Schools" (August W. Steinhilber); (2) "Sexual Harassment" (Jim Walsh); (3) "Current Issues under the Age Discrimination in Employment Act" (David R. Keller); (4) "Hazardous Waste Law Comes to the Schoolyard" (G. Richard Hill and Beth A. Clark); (5) "The Supreme Court's Affirmative Action Decisions: Implications for School Boards" (Elliot Mincberg); (6) "Communicable Diseases and Students: Legal Issues and Policy Considerations" (Arthur W. Cernosia); and (7) "U.S. Tax Policy: Will State and Local Governments Pay the Bill?" (Katharine Herber). (SI)

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NSBA promotes the quality of education through services to Federation Member state school board associations and local school districts. Federation members of NSBA include the 49 state school boards associations, the Hawaii State Board of Education and the boards of education in the District of Columbia, and the U.S. Virgin Islands. Founded in 1940, NSBA represents approximately 97,000 of the nation's school boards members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

About the NSBA Council of School Attorneys . . . .

Since 1967 the National School Boards Association's Council of School Attorneys has provided information and practical assistance to attorneys who represent public school districts. As the only national advocacy organization composed exclusively of attorneys representing school boards, NSBA's Council advises NSBA and its members on school law issues. It offers continuing legal education programs, produces specialized publications, and provides up-to-the-minute analysis of the issues. Council seminars are valuable forums for school attorneys to exchange ideas and information.

More than 2,500 attorneys, representing local school districts of all sizes, find membership in NSBA's Council of School Attorneys essential for keeping abreast of school law issues and trends. Attorneys in twenty-seven states receive these benefits through membership in their state school attorneys' councils which have affiliated with the NSBA Council of School Attorneys. States with affiliated councils include: Alabama, California, Colorado, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Maine, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington and West Virginia.

National School Boards Association
Council of School Attorneys

SCHOOL LAW IN REVIEW—1988

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FOREWORD

This volume represents a continuation of the Council of School Attorneys' past practice of publishing the presentations delivered at its annual School Law Seminar. During the 1988 meeting on March 25-26, 1988 in New Orleans, Louisiana, experienced school attorneys presented topics covering a wide range of current issues, all vital to competent legal representation of public school boards. These presentations have been compiled, edited and updated and now appear in this publication which will serve as a useful reference for attorneys and others who must know the latest developments in the law affecting schools.

I wish to thank the school attorneys who contributed their time, effort and expertise to this publication. I also recognize the work of Geoffrey Gray and Naomi Gittins who prepared these articles for final publication.

David M. Pedersen
Chairman
Council of School Attorneys

Secular Humanism and the Schools

By: August W. Steinhilber

INTRODUCTION

In an Information Service Bulletin entitled *Extremists v. School Boards* issued by the National School Boards Association in August 1966, the following quote appeared:

> ... a shadowy but frequently vicious war is being fought. The stakes are the minds of American school children. The antagonists are housewives, principals, teachers, physicians, school board members and veteran leaders. They range from do-gooders, standpatters, middle-of-the-roaders, to the lunatic fringe. The weapons are parliamentary procedure, delay, disruption. Sometimes, they include innuendo, character assassination, racial or religious bigotry, harassment, threats and—violence. No community is immune. Some of the participants are unaware of the true nature of the fight, and many are equally unaware that the same kind of fight is going on at the same moment in dozens of other communities around the country.
>
> ... (extremists) have realized that school boards pick school superintendents who, in turn, pick teachers, books, and establish curricula. Since few people turn out for school board elections, they are ripe pickings for a determined undercover campaign by a small group of *zealots*.[1]

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The battle described by these words written over 20 years ago continues today. In recent years such books as *Huckleberry Finn, One Flew Over the Cuckoo's Nest, Catch 22, Brave New World, Future Shock, Nicholas Nickleby, Grapes of Wrath, Romeo and Juliet, Of Mice and Men, Death of a Salesman, Grease, MacBeth, Red Badge of Courage, Birth of a Nation, Fame, Diary of Anne Frank, The Color Purple, Catcher in the Rye*, the Holt Rinehart and Winston Reading Series, Rand McNally Social Studies Series, the Scott Foresman Social Studies Series, as well as home economics books by Ginn and McGraw Hill have all been subject to attack.

While questions have been raised in the past over the content of books and their protrayal of blacks, women, ethnic groups and religious sects, most of those concerned did not seek censorship but rather expansion of the curriculum for broader development of issues. However, the new attacks seek a different result—to remove certain books in toto. As once noted by the Eighth Circuit, accomplishment of such a goal would have drastic consequences: "To eliminate everything

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[1] Dunbar, E. "The Plot to Take Over the PTA," *Look*, September 7, 1965.

that is objectionable to any of [the religious bodies in the United States] or inconsistent with any of their doctrines . . . will leave public education in shreds."[2]

To achieve these ends the new wave of religious extremists employ far more extensive tactics than previous viewpoint groups. They run for election to school boards. They have developed a set of guidelines on how to influence the board and community, including contacting businesses, obtaining names, addresses and phone numbers of all board members, packing school board meetings and securing outside financial and legal assistance. The groups maintain a nationwide network of information and develop coordinated efforts to influence school boards either politically or legally. Their advertisements appear widely in the media. Some broadcast their own television programs. Many have their own computerized mailing lists. They paint their opponents as antiparent, antichild, unAmerican or ungodly. They may "bootstrap" to promote their views by persuading a creditable publication to publish in the name of fair play an article supporting their views, and then later claiming that the prestigious publication supports their position.

These religious conservatives raise political objections, religious objections and legal theories. Often political and religious objections are so intertwined that it is hard to distinguish them. For example, their beliefs include such tenets as: the free enterprise system of capitalism is ordained by God; national interdependency and international brotherhood can lead to one world and one religion which would deny the existence of the real religion; cooperative efforts to deal with planetary problems such as pollution and hunger deny God's control of the world; roles for men and women are ordained by the Bible, therefore, the "women's rights movement" is contrary to Christian principles; use of imagination to understand the viewpoints of others denies scriptural authority; imagination can lead children to believe in the occult, idol worship and the supernatural; and tolerance toward others, especially religious tolerance, is the equivalent of teaching that all religions are valid.

Other objections which are clearly based on religious beliefs include: teaching evolution, including reference to the existence of life 3.5 million years ago; teaching humanism, wherein man is equated with God, such as the central theme of the Renaissance; values clarification or values discussions, which allegedly undermine the religious belief that all values must come from God; sex education, which the objectors view as the sole responsibility of the family and the church; and the absence of the Christian viewpoints which these fundamentalists claim means the schools have adopted or support the religion of secular humanism.

The legal attacks against the curriculum have been based on two constitutional theories: First, plaintiffs may charge that the action of the school board violates the establishment clause of the first amendment because the curriculum fails to reflect Christian fundamentalist points of view, thereby resulting in the creation of the religion of secular humanism. The goal of this attack is to remove the materials from the class for everyone. The second legal attack based on the free exercise clause seeks to obtain an alternative, less onerous curriculum or to

[2] **Florey v. Sioux Falls School District**, 619 F.2d 1311, 1318 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

permit the student to "opt out" of certain objectionable curricular activities. Such suits raise the classical confrontation between state interests and individual rights: Does the state have an overriding interest in teaching students diverse points of view as part of the education necessary to live in a pluralistic society? Or do parents have the right to excuse their children from any subject which they find objectionable?

THE AUTHORITY OF THE SCHOOL BOARD

Free Speech Cases

In *Island Trees Union Free High School v. Pico*,[3] several school board members had ten books removed from the school library because they viewed the books "as anti-American, anti-Christian, and anti-Semitic and just plain filthy." Several students filed suit on grounds that their first amendment rights had been violated.

The district court granted a motion for summary judgment on the ground that no first amendment rights were implicated. The court of appeals rejected that opinion and remanded the case for trial. In the U.S. Supreme Court, nine justices filed seven opinions in the case. Only three justices believed that students have a right to receive information. A majority of the Court stated that the school board did have authority over textbooks. Since the ruling in *Pico*, courts have reached a general consensus that library books cannot be removed but that school boards have much more authority over the curriculum.

More recently in *Kuhlmeier v. Hazelwood School District*,[4] a high school principal removed from the school sponsored newspaper two articles, one on teen pregnancy and one on the effect of divorce on students. In a 5-3 decision, the Court ruled that such action did not violate the student journalists' free speech rights. In so ruling the Court specifically relied on the school board's authority to control the school curriculum.

On January 29, 1988 the U.S. District Court for the Middle District of Florida, relying on the *Kuhlmeier* decision, ruled that a school board could remove two readings from the curriculum.[5] These rulings reaffirm that school officials have broad authority over curriculum decisions.

Establishment Clause Cases

- **Background**

In *Edwards v. Aguillard*,[6] the U.S. Supreme Court held that a Louisiana statute requiring the teaching of creation science whenever evolution was taught violated the establishment clause. Justice Brennan, speaking for the seven-member majority, declared that the statute did not have a secular purpose. The real purpose of the act was entirely religious, rather than to promote academic freedom.

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[3] 457 U.S. 853 (1982).

[4] 108 S.Ct. 562 (1988).

[5] Virgil v. School Board of Columbia County, 677 F.Supp. 1547 (M.D. Fla. 1988).

[6] 107 S.Ct. 2573 (1987).

In *Jaffree v. Wallace*,[7] the Supreme Court, in a 6-3 decision, held that the Alabama statute authorizing a moment of silence or prayer in the public schools violated the establishment clause because it did not have a secular purpose.

In *Florey v. Sioux Falls School District*,[8] students challenged the school board policy and procedure permitting the singing of Christmas carols. The school board had set up a citizens committee to advise the board. The committee consisted of members of the clergy (Catholic, Protestant and Jewish), an ACLU attorney, parents and teachers. This group had developed the five-page policy which called for recognition of religious beliefs and customs, outlined how to observe religious holidays and underscored the difference between teaching about religion and teaching religion. The court upheld the constitutionality of the practice.

- **Smith v. Board of School Commissioners**

While the *Edwards*, *Wallace* and *Florey* cases raised establishment clause objections to the presence of theistic practices and doctrines within the public schools, *Smith v. Board of School Commissioners*,[9] the now famous Alabama textbook case, focused on the issue of the state's alleged establishment of a nontheistic religion labelled "secular humanism."

Smith began with the *Wallace v. Jaffree* case. In *Wallace*, Smith had intervened to support the state statute allowing silent prayer in public schools and had asked that an injunction be issued to stop the teaching of the religions of secular humanism, evolution, materialism, agnosticism, atheism and others that he claimed had been established by the state.

District Court Judge Brevard Hand ruled in the original case that the first amendment did not apply to the states as an historical fact, thus he denied relief from the original plaintiffs on the issue of silent prayers. After Judge Hand was reversed, the case was bifurcated and Smith was permitted to try his secular humanism case.[10] Judge Hand had written in his earlier opinion: "If this court is compelled to purge 'God is great, God is good, we thank Him for our daily food' from the classroom, this court must also purge from the classroom those things that serve to teach that salvation is through oneself rather than through a deity."[11]

Although no parents testified in opposition to the books, Judge Hand banned 44 state-adopted textbooks used in home economics, history and social studies classes. His ruling was based on several legal/political/ philosophical theories: 1) the systematic exclusion of references to religion in the 44 textbooks in question established or supported the religion of secular humanism; 2) inclusion in those books of information characterized as antitheistic, hedonistic, antiparent, or which supports subjective value judgment, established or promoted the religion of

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[7] 472 U.S. 38 (1985).

[8] 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

[9] 655 F.Supp. 939, *rev'd*, 827 F.2d 684 (1986).

[10] Interestingly, during oral arguments in the court of appeals in the *Smith* case, each side responded in the negative when asked if it had moved for the bifurcation.

[11] 544 F.Supp. 1104, 1129 (S.D. Ala. 1983).

secular humanism, 3) John Dewey, the founder of the modern public education system, signed the Humanist Manifesto in 1933. His philosophy now permeates our education system, and 4) our system of public education is doing a poor job of educating our young.

The court of appeals in a unanimous opinion overruled Judge Hand. The court did not reach the question of whether secular humanism is a "religion," holding that its decision would be the same regardless of the answer to that question. Under Supreme Court decisions, said the court, the mere "accommodation" of religion is not sufficient to establish religion. Nor is it sufficient that government conduct confers "an indirect, remote or incidental benefit on a religion."[12]

Although agreeing that some of the material in the banned home economics books may be "offensive" to the plaintiffs, the court ruled that that is not sufficient to render the material violative of the establishment clause. "[T]he message conveyed is one of a governmental attempt to instill in Alabama public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making. This is an entirely appropriate secular effect."[13] The court further noted that if school districts are precluded from using materials or books that offend any particular religious belief, "there would be very little that could be taught in the public schools."[14]

The plaintiffs' complaint about the history and social studies books centered on the failure of the texts to portray a correct picture of the role played by religion in the history of this country. The court held that by the mere omission of historical facts, the state does not "discriminate" against religion. The court distinguished this case from *Epperson v. Arkansas*,[15] which held that a state establishes a religion by prohibiting the teaching of evolution. "Selecting a textbook that omits a particular topic for nonreligious reasons is significantly different from requiring the omission of material because it conflicts with a particular religious belief."[16]

"While these textbooks may be inadequate from an educational standpoint, the wisdom of an educational policy or its efficiency from an educational point of view is not germane to the constitutional issue of whether that policy violates the establishment clause."[17]

The plaintiffs chose not to seek review in the Supreme Court.

Free Exercise Clause Cases

- **Background**

In *West Virginia v. Barnette*,[18] the famous flag salute case, the Supreme Court held that the government could not require individuals to pledge allegiance to

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[12] *Smith*, 827 F2d at 691 (citations omitted).

[13] *Id.* at 692.

[14] *Id.* at 693 n. 10.

[15] 393 U.S. 97 (1968).

[16] *Smith*, 827 F2d at 694.

[17] *Id.*

[18] 319 U.S. 624 (1943).

the flag if to do so would violate their religious beliefs. One of the most often cited free exercise cases in the school context is *Wisconsin v. Yoder*,[19] wherein the Supreme Court held that the Amish could exempt themselves from compulsory attendance laws and withdraw their children from education at age 14 instead of 16. The Amish believed that additional education would endanger their children's salvation and indeed the existence of their community. The Amish had demonstrated a burden on their rights, "one that probably few other religious groups or sects could make."[20]

In *Spencer v. Baily*,[21] the court ruled that requiring a student to take ROTC classes as a condition of graduation violated his religious beliefs as a pacifist.

- **Mozert v. Hawkins County Board of Education**

In *Mozert v. Hawkins County Board of Education*,[22] a group of parents objected to their children reading the Holt Rinehart and Winston reading textbooks. They also objected to their children being taught critical thinking, having their children exposed to points of view different from their own, to role playing, to any teaching of values not based on the Bible and to teaching religious tolerance. When the parents first complained, school officials provided the students with alternative older, outdated books and sent the children to the cafeteria, library or other classrooms for their assignments and instruction in these other books. The school board on November 10, 1983 rejected these alternatives.

On December 2, 1983 the plaintiffs filed suit. In this case, the parents did not seek to ban the books but only to allow their children to opt out of the reading materials to which they objected.

The school board's defense included a discussion of the 1983 state laws adopting a Better Schools Program. That program was the Basic Skills First plan designed to assure certain skills in all grades K-8—a program which has improved reading achievement skills in Tennessee. The program which teaches more than reading skills forms part of an integrated curriculum. Information and skills learned in one subject are reinforced in others. Thus, the board contended, a failure to use this reading program could affect how a student learns in science, social studies or any other portion of the curriculum. The board also argued that the "opt out" concept created religious divisiveness in the community and increased pressure to change the curriculum to exclude certain controversial material.

Judge Thomas Hull for the U.S. District Court for the Eastern District of Tennessee ruled for the parents, saying "a reasonable alternative which could accommodate the [students'] religious beliefs, effectuate the state's interest in education and avoid Establishment Clause problems would be to allow ... students to opt out of the school district's reading program."[23] The school board appealed.

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[19] 406 U.S. 205 (1972).

[20] *Id.* at 236.

[21] 465 F.2d 797 (1972).

[22] 647 FSupp. 1194 (1986), *rev'd*, 827 F.2d 1058 (6th Cir. 1987).

[23] 647 F Supp. at 1203.

The appeals court opinion, written by Chief Judge Lively, stated that in order to prevail, the students must show first, that a government requirement "burdens" their free exercise of religion and second, that the requirement is not justified by a "compelling state interest." The opinion found the Supreme Court cases cited by the plaintiffs to be inapplicable to this case because they dealt with situations where individuals were compelled to *perform* an act or affirm their *belief* in matters which violated their religion, rather than merely to be *exposed* to ideas with which they disagree. The court declared: "The requirement that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion."[24]

Judge Lively also distinguished this case from *Wisconsin v. Yoder*. There, the Supreme Court upheld the right of the Amish to exempt their children from public schools because the Amish were preparing their children for life in a separate agrarian community that is the keystone of the Amish faith. In contrast, public education is designed to prepare the child for life in modern society. Judge Lively noted that the parents in Hawkins County want their children to acquire all the skills required to live in modern society but also want to have them excused from exposure to some ideas they find offensive. He also pointed out that Tennessee gives such parents the option of sending their children to a private school or teaching them at home.

Because Judge Lively held that the requirement to read the books does not burden the plaintiff's free exercise rights, his opinion does not reach the question of whether there is a compelling state interest in a uniform reading series. However, Judge Kennedy in a concurrence does reach that issue, finding that the state has a compelling interest in teaching "critical" reading: "Teaching students about complex and controversial social and moral issues is just as essential for preparing public school students for citizenship and self-government as inculcating in the students the habits and manners of civility."[25] She also notes that the "opt out" remedy imposed by the lower court promotes religious divisiveness. "If the school district were required to accommodate exceptions and permit other students to opt out of the reading program and other core courses with materials others found objectionable, this would result in a public school system impossible to administer."[26]

Judge Boggs' concurrence evidences some sympathy for the position of the plaintiffs and chastizes his colleagues for their "narrow" focus on specific examples of plaintiffs' concerns that "make plaintiffs appear so extreme that they could never be accommodated. . . ."[27] He notes that in another case with more sophisticated plaintiffs and a more articulate presentation, the real issues in the case would be more difficult to resolve under the Sixth Circuit's analysis.

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[24] 827 F2d at 1065.

[25] *Id.* at 1071 (Kennedy, J., concurring).

[26] *Id.* at 1072-73.

[27] *Id.* at 1074 (Boggs, J., concurring).

Unlike his colleagues, Judge Boggs believes that the school district's requirement does force the students to engage in *conduct* forbidden by their religion. But he notes that Supreme Court decisions have "almost never" interfered with curricula based on free exercise claims. In his opinion those decisions do not authorize lower courts to compel school districts to accommodate every objection to curricular materials made on a religious basis.

On December 31, 1987, a petition for a writ of *certiorari* reached the U.S. Supreme Court in *Mozert v. Hawkins County Public Schools*. The petition requested that the High Court review the decision of the Sixth Circuit for two reasons. First, the petitioners asserted that it created a conflict among the circuits. The plaintiffs cited an Eighth Circuit case where Jewish parents objected to the singing of Christmas carols[28] and a Ninth Circuit case challenging the required reading of a book.[29] Both cases asserted establishment clause violations, which the courts rejected; however, language in both decisions suggested that the plaintiffs might be able to prevail on a free exercise claim. Secondly, the petitioners argued that the appeals court decision conflicted with U.S. Supreme Court free exercise rulings.[30]

On February 22, 1988, the U.S. Supreme Court denied *certiorari*.[31]

AVOIDING FUTURE LITIGATION

The Supreme Court's denial of review in the *Mozert* cases does not signal the end of the battle over textbook content for several reasons. First, many feel that America has a religious heritage and that to teach its history adequately schools must teach *about* religion. For example, how could the civil rights movement of the 1960's be described without including the role of the various church groups? How can the founding of our country be taught without the discussion of religious freedom? Second, it must be pointed out that the Tennessee case was won on the facts. Had the case involved a single reading book not a part of an integrated curriculum, the decision may have been far different. Third, the groups that sponsored the litigation have not disbanded. Given their dissatisfaction with the results in *Mozert*, they will most certainly look for another test case.

Schools boards can take steps to minimize the possibility that any "test case" will arise in their school systems. School boards should have in place explicit policies and procedures for approving the school curriculum, including textbooks. Furthermore, similar policies should be developed to handle complaints about the curriculum after the initial decisions are made. A New York School Boards Association publication suggests the following:

> School boards should have textbook selection policies. Though the specific content of the policies should be left to individual boards, they may want to include certain features:

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[28] Florey v. Sioux Falls School District, 619 F2d 1311.

[29] Grove v. Mead School District, 753 F2d 1528 (9th Cir. 1985).

[30] West Virginia v. Barnette, 319 U.S. 624 (1943); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981); and Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. _____ (1987).

[31] 108 S.Ct. 1029 (1988).

1. A statement asserting the board's legal right to make the final decision in selecting textbooks;
2. A statement of philosophy or goals upon which the policy is based, and how it relates to the curriculum;
3. A definition of the materials to be covered under the policy;
4. A list of who should be on the selection committee;
5. A list of factors which the committee should consider when making their selection; and
6. A statement describing the procedures for handling challenged materials.

The board's statement of philosophy or goals upon which the policy is based may include among others its desire to promote such objectives as: 1) free access of students to different types of materials; 2) freedom to hear, discuss and review different ideas inherent in a pluralistic society; and 3) freedom of teachers and administrators to make curriculum recommendations. In stating this last objective, the board should be careful not to phrase it in terms of "academic freedom." Such language might be interpreted to give faculty authority over what should be taught. To the extent permitted by state law, the policy should clearly reserve final authority over the curriculum to the school board.

Educational objectives of the approved curriculum might include: 1) to provide facts, stimulate thinking, present diverse ideas and develop communications skills among students; 2) to encourage reading and listening; 3) to stimulate intellectual growth, including the ability to make intelligent judgments; 4) to establish or strengthen fundamental values necessary to support our free democratic society; and 5) to support the civil rights of others.

In setting forth procedures for developing specific curriculum recommendations, the board might want to consider including: 1) role of the superintendent and other administrators and teachers to make recommendations; 2) criteria for such recommendations; 3) role and composition of community advisory committees; 4) encouragement of parental participation in making recommendations; and 5) right of parents and other members of the public to review materials before a final decision is made.

A board policy should also establish procedures to deal with challenges to the existing curriculum, including textbooks. Parents should be treated fairly. Their concerns are real, and the school board has a responsibility to handle the situation in such a way as to consider the viewpoints of all. The policy should indicate that access to curriculum information is available during regular school hours at a specified place.

The policy should encourage informal discussions between parent and principal when a complaint first arises. If that fails to yield a resolution of the problem, then a formal complaint process may be initiated. The policy should require that the formal complaint be made in writing and signed by the parent, guardian, student or other resident of the community who is raising the objection. This may be accomplished through a formal complaint form that asks specific questions about the objectionable materials. Once the complaint is received, the school should promptly acknowledge its receipt in a courteous manner and indicate in such correspondence the next step in the complaint process. The process should not be so cumbersome that parents feel overwhelmed by the

school procedures. It may also help to have in place a citizens advisory committee on the curriculum. Its advice can be critical in several ways. First, it will provide the school board with an independent view of the issue, and second, parent objectors will see that decisions are not controlled by the "bureaucracy." After all the facts are known, then the board can make a decision.

One word of warning to a school board: if a complaint first surfaces at a school board meeting, the issue should not be decided immediately. The board should advise the objectors to pursue their grievances through the complaint process to make sure that all the facts are properly gathered.

CONCLUSION

What should a school district do if the objectors really are trying to "burn the books"? First, all of the facts must be documented. The school board lawyer should definitely be consulted at this stage. The board may also want to begin its own anti-censorship campaign. The aid of other groups should be enlisted. The PTA, other citizens' groups and or the clergy may provide support for the school board's position. Other groups such as the Association of American Publishers, American Library Association, and People for the American Way may be able to provide assistance. Press briefings and meetings with newspaper editors may prove useful in keeping the public accurately informed. Often groups looking to burn books are looking as much for favorable media attention as for success in their efforts. The media will also understand that if these efforts against the school system result in censorship, the first amendment rights of all are in jeopardy.

Sexual Harassment

By: Jim Walsh

If it is true that the law changes as the values of society evolve, then perhaps no area of law is more volatile than the law concerning the relationships between the sexes. With the increase in divorce rates and the influx of women into previously male-dominated enclaves of the work force has come a revolution in society's views of the roles and responsibilities of both men and women. Not only have the laws pertaining to divorce, child custody and other family matters undergone change, the law has also begun to address the very sensitive problem of sexual harassment in the workplace.

This article will discuss the key issues and court decisions that have dealt with this problem. The discussion will focus first on Title VII litigation. State law causes of action will also be examined. Finally, the article explores the prospects for extension of the principles of sexual harassment to the teacher-student relationship—an area that should be of great concern to school trustees and administrators.

SEXUAL HARASSMENT AND TITLE VII

Sexual harassment is a form of discrimination based on sex. Title VII of the Civil Rights Act of 1964,[1] makes such discrimination an unlawful employment practice:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

While the statute prohibits discrimination based on sex, the regulations adopted in 1980, specifically identify sexual harassment as an actionable form of discrimination under the statute. The regulations state:

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an

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[1] 42 U.S.C. § 2000e-2.

> individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[2]

Any discussion of the judicial interpretation of these standards must begin with the Supreme Court's 1986 decision in *Meritor Savings Bank, FSB v. Vinson*.[3] The case arose after Mechelle Vinson quit her job at the bank where she had worked for four years. Under the supervision of Sidney Taylor, Vinson began as a teller trainee and had received promotions up to the position of assistant branch manager. All parties agreed that Vinson's promotions had been based strictly on merit—a fact that later became key in the analysis of the courts.

According to Vinson, Taylor treated her kindly at first, but then later suggested a sexual relationship. At first she refused, but later acquiesced for fear of losing her job. Vinson alleged that she had intercourse with Taylor 40-50 times in four years, that he fondled her in public, exposed himself to her, and even forcibly raped her on several occasions—all of which Taylor denied.

The district court ruled that Vinson had not been harassed.[4] Apparently focusing on the fact that Vinson's promotions had been based on merit, rather than the sexual relationship with her boss, the court ruled that Vinson had failed to establish a case of sexual harassment. Moreover, the court found that the relationship—if it existed at all—was one in which Vinson voluntarily participated.

The Court of Appeals for the District of Columbia Circuit reversed this decision.[5] The appeals court stated that a violation of Title VII may be predicated on either of two theories: harassment that involves the conditioning of concrete employment benefits on sexual favors; and harassment that creates a hostile or offensive working environment.[6] Furthermore, the court held that the "voluntariness" of the relationship was irrelevant.[7] Finally, in the court's view an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct.[8]

When the case reached the Supreme Court, there were three key issues to resolve: (1) Can a plaintiff establish a sexual harassment case in the absence of a tangible economic loss? Is the creation and toleration of a hostile and offensive environment actionable under Title VII? (2) Can the complaining party willingly participate in a sexual relationship and still prevail in a sexual harassment suit? Does the voluntary participation of the complaining party provide a defense? (3) Under what circumstances is the employer liable for the acts of its employees?

The Supreme Court ruled squarely in favor of the hostile environment theory. Relying on the EEOC's regulations, the Court agreed with the court of appeals

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[2] 29 C.F.R. § 1604.11(a) (1987).

[3] 477 U.S. 57 (1986).

[4] 23 FEP Cases 37 (D.D.C. 1980).

[5] 753 F.2d 141 (D.C. Cir. 1985).

[6] *Id.* at 145.

[7] *Id.* at 146.

[8] *Id.* at 150.

that there are two distinct types of sexual harassment suits. The first is a "*quid pro quo*" suit, in which the plaintiff establishes a tangible economic loss arising out of sexual harassment. In such cases the plaintiff is able to prove that she lost her job or was denied a promotion because of a refusal to submit to sexual harassment.[9] Since Vinson suffered no economic loss, she was unable to establish a *quid pro quo* case.

But the Court also recognized a second actionable form of sexual harassment—the "non *quid pro quo*" or hostile environment case.[10] The Court noted that the regulations specifically define sexual harassment as:

> . . . verbal or physical conduct of a sexual nature . . . when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The Court held that the individual who has to work in such a "hostile environment" has been discriminated against on the basis of sex, just as much as the employee who loses a job because she refuses to have sex with her boss. Accordingly, the case was remanded to give the district court an opportunity to consider whether or not Vinson could prove a violation of Title VII under the hostile environment theory.[11]

As to the second issue, the Supreme Court opened the door to sexual harassment suits even when the woman participates willingly. The district court in the *Vinson* case did not resolve the conflicting testimony as to whether or not Vinson and Taylor ever had a sexual relationship. The court seemed to consider the issue irrelevant, inasmuch as it found that Vinson's participation was "voluntary." But the Supreme Court, again focusing on the regulations, found that the willing participation of both parties is not a defense:

> But the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 29 C.F.R. 1604.11(a) (1985).[12]

The Court recognized that this standard "presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact,"[13] but it directed lower courts to focus on "whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[14] Accordingly, the Court held that testimony concerning the complaining party's sexually provocative

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[9] *Vinson*, 477 U.S. at 64-65.

[10] *Id.*

[11] *Id.* at 68-69.

[12] *Id.*

[13] *Id.*

[14] *Id.*

manner of speech and dress is "obviously relevant."[15] The Court noted that the regulations direct that sexual harassment must be assessed in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred."[16]

Finally, the Court declined to issue a definitive ruling on the issue of employer liability. The Court rejected the strict liability standard of the circuit court, and at the same time rejected the bank's position that the mere existence of a non-harassment policy and a grievance process insulated the employer from liability. Instead, the Court opined that Congress wanted courts to look to agency principles for guidance in this area.[17] Thus, the applicable standard will vary from state to state, depending on the law of that state with regard to employer liability for acts of employees.

In *Meritor*, the Supreme Court gave considerable deference to the Equal Employment Opportunity Commission's guidelines as a correct statement of the legal principles to be applied. The guidelines give the following examples of sexual harassment claims:

> If a female laborer complains to her foreman that the male workers on the job direct sexually suggestive remarks and gestures at her and the foreman tells her that such conduct is to be expected as part of the job, then her submission to the sexually harassing conduct is made an explicit term or condition of her employment.[18]

A connection between the conduct and the terms or conditions of employment can be inferred if:

> other women workers had complained to the employer, either directly or through an agent or supervisor, and had been told that if they did not like the conduct they could find another job.[19]

The EEOC guidelines further explain explicit *quid pro quo* harassment:

> If an employee's promotion depends on his or her granting sexual favors and the promotion is denied because the employee refuses to do so, then the employee is the victim of sexual harassment. The same result is reached if the employee does submit and consequently receives the promotion.[20]

In other words, sexual conduct in the above example is used as the "basis for employment decisions" affecting the employee. Moreover, the EEOC takes a broad view of the term "condition of employment," noting that, "whether it involves promotion, discharge, transfer, training, work assignment, salary, over-

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[15] *Id.* at 69.

[16] *Id.* (citing, 29 C.F.R. § 1604.11(b)).

[17] *Id.* at 72.

[18] EEOC Compliance Manual § 615:0006 (1982).

[19] *Id.*

[20] *Id.*

time, or getting an office with a window—the decision cannot have a sexual string attached."[21]

An example of a hostile environment theory is described in the guidelines:

> If certain male employees make sexual remarks, jokes, or gestures in the presence of or directed toward female employees, that conduct may make the work atmosphere intimidating or threatening for the female employees. The harassment of the female employees may also create an offensive work environment for other male employees.[22]

It is clear then that under Title VII sexual harassment cases come in two varieties—the *quid pro quo* case involving loss of economic benefits, and the hostile environment case. Moreover, the key issue is whether or not the sexual advances, and sexually related conduct was "unwelcome," rather than whether or not the parties participated willingly. The courts have applied these standards in a great variety of fact situations. Appendix A contains a listing of representative cases.

EMPLOYER LIABILITY

The one issue on which the Supreme Court declined to rule in the *Meritor* case is that of employer liability. Under what circumstances should the employer be held liable for the actions of its employees? The Supreme Court deferred to agency principles in the various states. In the absence of any clear direction in the *Meritor* case, examination of EEOC regulations and subsequent case law may provide some guidance.

The Code of Federal Regulations describes three sets of circumstances under which an employer might be held responsible for sexual harassment on the job. The employer's liability is defined in terms of the employment relationships involved.

In the case of agents or supervisory employees who engage in inappropriate sexual conduct, the regulations appear to impose strict liability:

> (c)... [A]n employer ... is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.[23]

With respect to sexual harassment by fellow employees, the regulations state that the employer is liable if it "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."[24]

Finally, the regulations make an employer liable for the acts of non-employees (e.g., customers, service personnel), if the employer "knows or should have

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[21] *Id.*

[22] *Id.*

[23] 29 C.F.R. § 1604.11(c) (1987).

[24] 29 C.F.R. § 1604.11(d).

known of the conduct and fails to take immediate and appropriate corrective action."[25]

In at least one pre-*Meritor* case, the Seventh Circuit imposed strict liability on an employer in a case where a plant supervisor used his authority to hire and fire to extort sex from female employees.[26]

In most instances, however, the circuit courts appear to apply a less strict standard. In cases where the employer responded promptly and appropriately to the situation, liability has generally not been imposed on the employer, even when the harassment is perpetrated by a supervisor. For example, in *Barnes v. Costle*,[27] the court held that an employer is generally liable for the discriminatory practices of its supervisors, but may be relieved of that liability if the supervisor acts without the employer's knowledge or the situation is rectified when discovered. In *Tomkins v. Public Service Electric & Gas Co.*,[28] the court held that an employer is liable for the actions of its supervisor only when prompt and appropriate remedial action is not taken after acquiring knowledge. In *Bundy v. Jackson*,[29] the court held that an employer can negate liability by taking immediate and appropriate corrective action. In *Jones v. Flagship International*,[30] the court established a test for making a hostile environment case that included the burden of proving that the employer knew or should have known of the harassment and failed to take prompt remedial action.

Appendix B contains a list of representative cases on the issue of employer liability.

Both the regulations and the cases clearly show that prevention is "the best tool for elimination of sexual harassment." Employers should affirmatively raise the issue of harassment with employees. Appropriate education of employees regarding their rights under Title VII and sanctions against employers who violate the act provide the best defense against possible sexual harassment claims.[31]

SEXUAL HARASSMENT CLAIMS UNDER STATE TORT LAWS

Some victims of sexual harassment in the workplace choose to pursue state tort law claims rather than the Title VII cause of action. Relief under Title VII includes injunctions to restrain offensive practices, reinstatement and back pay, nominal damages, and attorneys' fees. Additional remedies are available under common law tort theories of recovery.

State law tort actions for sexual harassment are usually brought as claims for assault and battery or for intentional infliction of emotional distress. As intentional torts, these theories of recovery allow exemplary as well as compensatory damages, and may otherwise broaden an employee's grounds for relief. The state law

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[25] 29 C.F.R. § 1604.11(e).

[26] Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F.2d 599 (7th Cir. 1985).

[27] 561 F.2d 983 (D.C. Cir. 1977).

[28] 568 F.2d 1044 (3d Cir. 1977).

[29] 641 F.2d 934 (D.C. Cir. 1981).

[30] 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

[31] 29 C.F.R. § 1604.11(f) (1987).

claim can expand on the Title VII cause of action, find liability under state anti-discrimination statutes, or look to general common law principles in defining the scope of employer liability.

For example, in *Eide v. Kelsey-Hayes Company*,[52] the Michigan Court of Appeals found that an employee could appear to consent to sexual conduct in the workplace while still finding the activity unwelcome, thus drawing on a Title VII principle. The court then looked to Michigan's own Elliott-Larsen Civil Rights Act to award damages unavailable under Title VII. The employee recovered $240,000 in compensatory damages and $32,000 in exemplary damages, and her husband won $28,000 for loss of consortium. A New York court similarly held an employee's spouse stated a claim for loss of consortium in a sexual harassment case.[53]

The Massachusetts Supreme Court broadened the scope of recovery for sexual harassment in two recent cases. In *College-Town, Division of Interco, Inc. v. Massachusetts Commission Against Discrimination*,[54] the court held a hostile environment cause of action cognizable under Massachusetts law, in violation of the state anti-discrimination statute. The Massachusetts court said that state courts might look to Title VII for interpretive guidance without being bound by the requirements of the federal cause of action. Thus, the employer could be held strictly liable with no requirement of notice. Damages for emotional distress were permitted, the employee was not required to mitigate damages, and an award of interest on back pay was held to be correct.

In *O'Connell v. Chasdi*,[55] an employee sued both a fellow employee and the employer for assault and battery and intentional infliction of emotional distress as well as for violation of her civil rights. The Massachusetts Supreme Court recognized each claim. Federal law alone would not allow recovery for assault and intentional infliction of emotional distress. State law alone would not allow the civil rights claim, because the Massachusetts act was inapplicable to companies with fewer than six employees. Recognizing the federal civil rights claim and the state common law tort claim, the court allowed the employee to advance both theories of recovery at the same time.

Under particularly egregious circumstances, the Arizona Supreme Court held an employer independently liable for the sexual harassment of an employee by her supervisor. In *Ford v. Revlon, Inc.*,[56] the employee was allowed $100 compensatory and $1,000 punitive damages from her supervisor for assault and battery but no recovery for intentional infliction of emotional distress. The employer was held liable for $10,000 compensatory and $100,000 punitive damages for intentional infliction of emotional distress but not for assault and battery. The employer was further ordered to pay attorney's fees for the employee.

The basis for the employee's recovery was state tort law. Arizona law holds an employer liable for the acts of his agent which are extreme and outrageous. First,

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[52] 154 Mich. App. 142, 397 N.W.2d 532 (1986), *aff'd in part, rev'd in part*, 431 Mich. 26, 427 N.W.2d 488 (1988).

[53] Spoon v. American Agriculturalist, Inc., 502 N.Y.S.2d 296, 120 A.D.2d 857 (1986).

[54] 400 Mass. 156, 508 N.E.2d 587 (1987).

[55] 400 Mass. 686, 511 N.E.2d 349 (1987).

[56] 153 Ariz. 38, 734 P.2d 580 (1987).

the employee had to demonstrate extreme and outrageous conduct. The court found that ignoring the employee's reports of her supervisor's threats and physical assaults over a thirteen month period satisfied the requirement. Next, either intent to cause emotional distress or reckless disregard that such distress would occur had to be demonstrated. The court found the employer's actual knowledge of the events and failure to conduct prompt investigation rose to the level of reckless or intentional disregard for the employee's welfare. Finally, the employee was required to show that severe emotional distress did occur. In this case, the employee became physically ill and attempted suicide during the period of harassment.

The Arizona Supreme Court held the employer independently liable not only for intentional infliction of mental distress but also for breach of contract. The court reasoned that the corporation disregarded its own policies and guidelines by failing to respond to the employee's sexual harassment complaints. The failure to respond breached a contract implied by the corporation's announced policies and procedures. This breach gave rise to the award of attorney's fees.

CONSTITUTIONAL CLAIMS

As public employers, school districts and school officials are additionally vulnerable to claims that sexual harassment violates protected constitutional rights of teachers or students. Claims have been advanced on the grounds of interference with fundamental due process rights, first amendment rights, or liberty rights. Because employees have a well defined right to freedom from sexual harassment under Title VII, school officials need to be most aware of possible constitutional violations vis-a-vis student claims of harassment.

The sensitive area of teacher/student relationships is particularly likely to breed cases raising sexual harassment issues. Two recent cases illustrate how such a case might arise.

In a recent decision, the Fifth Circuit has held that a student has a constitutionally protected right to be free from the harm posed by anti-social activities while attending school. *Lopez v. Houston Independent School District*.[57] *Lopez* establishes a constitutional cause of action against a school district when its employee acted with callous disregard for a student's rights. The court points out that liability will not extend to the school district under 42 U.S.C. § 1983 based on its employer relationship to the tort-feasor or upon a respondeat superior theory. Liability extends to the district only for "deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official policy."[58]

In the *Lopez* case, plaintiff alleged that a school bus driver failed to stop the bus and render aid when a student passenger was beaten unconscious in a fight. The Fifth Circuit concluded that the driver's failure to protect the student, if proven true, would support a § 1983 action against the driver if a jury found that such conduct "rose to the level of callous indifference and was a cause of injury."[59]

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[57] 817 F.2d 351 (5th Cir. 1987).

[58] *Id.* at 353 (quoting Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984) (en banc)).

[59] *Id.* at 356.

While *Lopez* does not directly bear on sexual harassment, it illustrates how the courts might impose a legal duty on public schools to protect students from the harm posed by inappropriate sexual conduct by school officials, or even by other students.

A Pennsylvania case is more directly on point. There, a federal district court held that a school district can be held liable to a student for the actions of an employee in a sexual harassment context. Again, the fundamental right protected is a liberty interest, entitling the student to the protection of the district and its officials.

In *Stoneking v. Bradford Area School District*,[40] a female student alleged sexual harassment perpetrated by the school band director and named the district, the principal, the assistant principal, and the superintendent as defendants. The court held that the student had a right under the fourteenth amendment and § 1983 to be protected from "state intrusions into the realm of personal privacy and bodily security."[41] The court further held that genuine issues of material fact as to the liability of the school district existed; the question of liability was for the jury. The court concluded that a jury could infer that the existence of a practice or custom caused the student's injuries. The court based the decision on reported past incidents of sexual misconduct between the school district's students and teachers, apparently viewing the past response to the situations as inadequate.[42]

As in cases of hostile environment sexual harassment under Title VII, two key factors appear to determine whether or not liability will extend to school districts for the misconduct of their employees. First, courts will consider the frequency of the sexual conduct. As more incidents of harassment can be shown by the employee or student, the employer or school district is more likely to be held responsible. Second, the timeliness and effect of the school's response to complaints will be considered. The immediacy and appropriateness of an employer's action upon receiving reports of unlawful sexually oriented behavior relate directly to employer liability. Charges that harassment is a policy or custom of the district or employer can be dispelled by a showing of affirmative action taken to eliminate sexual harassment from the school or workplace.

School officials must be further aware of constitutional claims raised in sexual harassment cases brought by public employees against their employers. In *Bohen v. City of East Chicago*,[43] for example, an employee claimed violation of equal protection rights under the fourteenth amendment. The court emphasized the importance of showing repeated incidents of harassment that evidence a "pattern or practice of discrimination."

CONCLUSION

The law pertaining to sexual harassment has developed rapidly, and will continue to do so. The notion that sexual harassment is an actionable form of

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[40] 667 F.Supp. 1088 (W.D. Pa. 1987), aff'd, 856 F.2d 594 (3d Cir. 1988).

[41] *Id.* at 1095.

[42] *Id.* at 1102.

[43] 799 F.2d 1180 (7th Cir. 1986).

discrimination in the workplace is not likely to change, however. Public employers are well advised to insure that their key administrators are well versed in this area of the law, pro-active in enforcing the law, and swift to respond to signs of trouble.

APPENDIX A

TITLE VII SEXUAL HARASSMENT CASES

Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)
Title VII claim stated if government employee's job was abolished because she repulsed her supervisor's sexual advances (but in the case of a bisexual supervisor, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike).

Wright v. Methodist Youth Services, Inc., 511 F. Supp. 307 (N.D. Ill. 1981)
Discharge of a male employee because he rejected homosexual advances made by his supervisor violated Title VII.

E.E.O.C. v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981)
Lobby attendant discharged for refusing to wear a revealing bicentennial uniform was terminated in violation of Title VII.

Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977)
Office assistant discharged for refusing her supervisor's advances.

Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978)
Refusal to have sex with supervisor caused retaliatory termination.

Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3d Cir.1977)
Employee's continued employment and advancement violated Title VII if either knowingly or constructively dependent on acquiescence to supervisor's advances.

Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979)
Employee failed to state a claim for sexual harassment where she failed to allege that the department chairman had authority to terminate or recommend termination of her employment.

Cobb v. Dufresne-Henry, Inc., 603 F. Supp. 1048 (D. Vt. 1985)
Employee who was discharged after a dispute with her employer regarding whether or not she had used the term "sexual harassment" in complaining about a poster that advertised the company picnic did not state a Title VII claim where evidence indicated she had been fired for lying.

Harrison v. Reed Rubber Co., 603 F. Supp. 1457 (E.D. Mo. 1985)
Factory line worker was demoted after complaining of her superintendent's open and unwelcome affection for her.

Joyner v. AAA Cooper Transportation, 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd*, 749 F.2d 732 (11th Cir. 1984)

Mechanic who rebuffed his manager's homosexual advances made off the job stated a Title VII case when he was later laid off after reporting the incident.

Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F.2d 599 (7th Cir. 1985)
A plant employee who was demoted, then discharged, after refusing the repeated sexual advances of her male supervisor won Title VII case over unconvincing testimony that she was fired for unsatisfactory performance.

Burns v. Terre Haute Regional Hospital, 581 F. Supp. 1301 (S.D. Ind. 1983)
Testimony of employee's husband and two co-employees that an administrator had made suggestive comments to her did not support claim that the incident caused her termination a year later, especially since the decision to terminate was not within the administrator's exclusive authority.

Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986)
Waitress established a Title VII claim by showing her employer's consensual sex partner got preferential job assignments, despite substandard performance, while employees who refused advances got less desirable job assignments.

King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985)
Employee who established that a sexual relationship between her supervisor and another employee influenced that employee's promotion over her was not required to prove the sexual relationship had been consummated.

Marentette v. Michigan Host, Inc., 506 F. Supp. 909 (E.D. Mich. 1980)
Waitresses sought injunctive relief from enforcement of sexually provocative and discriminatory dress code under Title VII.

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)
Sexual harassment may amount to discrimination regardless of loss of tangible job benefits.

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)
Air traffic controller alleged that workplace was pervaded with verbal sexual slurs, insults, and innuendo.

Cummings v. Walsh Construction Co., 561 F. Supp. 872 (S.D. Ga. 1983)
Employee who rebuffed advances of supervisor and foreman was required to perform harsh and unpleasant tasks.

Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986)
Female dispatcher's claim that sheriff made numerous sexual advances and forced sex with her on one occasion stated a hostile environment claim.

Downes v. FAA, 775 F.2d 288 (Fed. Cir. 1985)
Five incidents of sexually offensive conduct in three years did not establish a pattern sufficient to constitute a pervasively hostile environment.

Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323 (S.D. Miss. 1986), *aff'd*, 824 F.2d 971 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1021 (1988)
Female public works department chemist failed to make out a hostile environment claim where evidence showed she participated in crude, sexually oriented jokes and banter.

Vermett v. Hough, 627 F. Supp. 587 (W.D. Mich. 1986)

Crude, physical clowning and horseplay among police troopers was childish but did not rise to the level of sexual harassment.

Robson v. Eva's Super Market, Inc., 538 F. Supp. 857 (N.D. Ohio 1982)
Evidence that a counter clerk was assigned more difficult tasks and otherwise penalized at work by her supervisor after refusing his advances established a Title VII cause of action.

Zabkowicz v. West Bend Co., 589 F. Supp. 780 (E.D. Wisc. 1984)
A female warehouse worker was subjected to verbal abuse, posted drawings bearing her initials of naked women or women engaged in sex acts and repeated exposures by her co-workers.

Rabidue v. Osceola Refining Co., 584 F. Supp. 419 (D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 1983 (1987)
Judged by an objective standard, pictures of nude women and vulgar language in a refinery did not create a legally hostile and offensive work environment.

APPENDIX B

EMPLOYER LIABILITY IN SEXUAL HARASSMENT CASES

Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977)
Employer may be liable for the acts of its agents and supervisory employees if it fails to investigate complaints of discrimination.

Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)
Employer is generally liable for the discriminatory practices of supervisors under Title VII, but may be relieved of responsibility if the supervisor acts without the employer's knowledge or the situation is rectified when discovered.

E.E.O.C. v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981)
Building management corporation and its cleaning contractor held jointly liable for sex discrimination against contractor's employee.

Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978)
Employer may be relieved of liability for harassment of a supervisor only where the employer has a policy of discouraging harassment, employee has failed to present the matter to a publicized grievance board, and the employer fails to rectify the situation.

Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3d Cir. 1977)
Employer liable for the actions of a supervisor directly or vicariously, with actual or constructive knowledge, when prompt and appropriate remedial action is not taken after acquiring knowledge.

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)
An employer is responsible for the discriminatory acts of its agents or supervisors regardless of whether the employer knew or should have known of the acts, but may negate liability by taking immediate and appropriate corrective action.

Howard University v. Best, 484 A.2d 958 (D.C. App. 1984), *appeal after remand*, 547 A.2d 144 (D.C. App. 1988)
A university is liable to a professor for sexual harassment by a dean because he had a critical role in personnel affairs and made the final decision not to renew the professor's contract.

Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979)
Employee was not required to first seek redress through bank's personnel department in order for company to be held liable under Title VII.

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)
Employer was or should have been aware of harassment because of pervasive character and because of employee's specific complaints to her supervisors; policy against harassment was ineffective.

Cummings v. Walsh Construction Co., 561 F. Supp. 872 (S.D. Ga. 1983)
Sexual harassment was so widespread that company had constructive knowledge of it; top level management personnel were involved in the activity; therefore, company was liable for the activity even though company policy was violated.

Harrison v. Reed Rubber Co., 603 F. Supp. 1457 (E.D. Mo. 1985)
Instructions to plant supervisor to stay away from an employee, without directions to cease sexual harassment and without monitoring by the employer, were not enough to preclude employer liability.

Robson v. Eva's Super Market, Inc., 538 F. Supp. 857 (N.D. Ohio 1980)
Supervisor who responded to an employee's complaints of harassment by telling her to ignore the incidents was clearly liable for the harassing activity.

Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F.2d 599 (7th Cir. 1985)
Corporation held strictly liable under doctrine of respondeat superior where plant supervisor used his authority to hire and fire to extort sex from female employees in exchange for keeping their jobs.

Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983)
When a hospital employee complained that a supervisor's choice for a promotion decision was based on sex, the hospital administrator was liable because he did not pay attention to the complaint, no remedial action was taken for a year, and the supervisor's eventual transfer included a promotion.

Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987)
Employer was sufficiently prompt in responding to employee's sexual harassment claims so as not to be liable to employee under Title VII.

Scott v. Sears, Roebuck and Co., 605 F. Supp. 1047 (N.D. Ill. 1985), *aff'd*, 798 F.2d 210 (7th Cir. 1986)
Except for an isolated touch and an isolated vulgar comment, a female mechanic's allegations of suggestive language and behavior directed at her by other employees did not extend liability to her employer for sexual harassment. Employee could not attribute employer with either actual or constructive knowledge.

Zabkowicz v. West Bend Company, 589 F. Supp. 780 (E.D. Wisc. 1984)
Despite employee's repeated complaints and physical evidence of harassment, management did not conduct an investigation or discipline an employee for nearly four years. Reciting rules against harassment at occasional meetings was ineffective response.

Barrett v. Omaha National Bank, 584 F. Supp. 22 (D. Neb. 1983), *aff'd*, 726 F.2d 424 (8th Cir. 1984)
Because of bank's remedial response to a female employee's complaint of her male co-worker's inappropriate behavior on a business trip, the claim against

the bank failed. The bank launched an investigation within four days. The perpetrator was placed on 90 day probation, warned that future misconduct would result in termination, and was passed by for pay raises for 15 months. A letter reporting the incident was placed in his personnel file. For failing to intervene, another male employee was reprimanded, passed over at least three times for promotions and denied raises for 18 months. A letter was placed in his file.

Current Issues Under the ADEA

By: David R. Keller

INTRODUCTION

The Age Discrimination in Employment Act[1] (ADEA) was enacted on December 6, 1967 and became effective June 12, 1968. Written to protect workers over the age of 40, the goal of the ADEA was:

> . . . to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.[2]

The ADEA has been frequently amended, first in 1974 when the definition of "employer" was modified to include all state and local government agencies and interstate agencies, without regard to the number of employees in the employing unit. Amendments in 1978, among other things, raised from 65 to 70 the upper limit of the protected age group and codified the right to a jury trial.

In 1982, the ADEA was amended to require employers to provide for employees age 65 through 69 the same health care benefits provided to younger employees. A loophole in benefit coverage was closed by a 1984 amendment requiring employers to offer to spouses of employees age 65 through 69 the same health care benefits offered to the spouses of younger employees. Again in 1985 Congress expanded the rights of older employees to benefits with the passage of the Consolidated Omnibus Budget Reconciliation Act, mandating that employees and their spouses over the age of 69 be offered health care insurance on the same terms as other employees and spouses.

Amendments passed in 1987 included HR 4154 which expanded coverage of the ADEA to all persons over the age of 40 (eliminating the age 70 cap). They also included a segment of the Budget Reconciliation Act which prohibits elimination of or reduced accrual of pension benefits or allocations to an employee's pension benefit account because of age. This provision, effective January 1, 1988 or upon the later expiration of a collective bargaining agreement, requires accrual of benefits beyond "normal" retirement age, but permits limitations on total amount of benefits or total years of service for which pension benefits are provided if these limitations are imposed without regard to age.

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[1] 29 U.S.C. §§ 621-634.

[2] 29 U.S.C. § 621(b).

Despite the attention given by Congress to the ADEA in recent years and the periodic alteration in the age ranges of the protected class, the core provisions of the Act have not changed. The basic prohibitions of the ADEA remain that an employer may not fail or refuse to hire, discharge or otherwise discriminate against any individual over the age of 40 with respect to compensation, terms, conditions or privileges of employment, and may not limit or classify an employee in any way which might deprive him of employment opportunities or adversely affect his status as an employee because of his age.[5] With only a few exceptions, no individual may be forced to retire at any particular age under federal law.[4]

The 1980's has been a period of heightened attention to the problems and concerns of older workers. In addition to Congress, administrative agencies and courts have focused on enforcing individual rights protected by the Act. According to the Equal Employment Opportunity Commission (EEOC), the number of age discrimination suits filed annually doubled between 1980 and 1986.[5]

The typical age discrimination claim involves an allegation by an older worker or workers that a discharge or other adverse employment decision was made on account of age. These "disparate treatment" cases closely parallel similar cases decided under Title VII of the Civil Rights Act of 1964. The burden of proof, the definition of a prima facie case, and the order of introducing evidence follow the Title VII pattern.[6] Most courts have now borrowed, as well, the Title VII concept of "disparate impact" in analyzing age discrimination claims involving allegations that neutral criteria for employment decisions have an adverse impact on older workers.[7]

Although individual employment termination cases remain the primary focus of ADEA litigation, there are a number of unresolved issues under the ADEA which have broader implications. These include the legal constraints faced by employers desiring to offer early retirement incentive programs to encourage retirement, the validity of a release of ADEA rights upon the discharge of an employee, the res judicata or collateral estoppel effect of state and local governmental decisions, and the definition of "willful violation" sufficient to trigger liquidated "double" damages. The following is a brief discussion of each of these issues, all of which are emerging areas of ADEA interpretation about which considerable future litigation is likely.

EARLY RETIREMENT INCENTIVE PROGRAMS

Nothing in the ADEA prohibits an employer from allowing individuals to elect voluntarily early retirement at a specified age.[8] But difficult age discrimination

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[3] 29 U.S.C. §§ 623(a), 631(a).

[4] Exceptions include 1) firefighters or law enforcement officers employed by a State or political subdivision of a State (29 U.S.C. § 623(i)); 2) bona fide executives or high level policymakers (29 U.S.C. § 631(c)); 3) tenured employees at institutions of higher learning (29 U.S.C. § 631(d)).

[5] Bureau of National Affairs, *Older Americans in the Work Force: Challenges and Solutions* (1987).

[6] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Loeb v. Textron, Inc., 600 F2d 1003 (1st Cir. 1979); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985); Berndt v. Kaiser Aluminum & Chemical Sales Inc., 789 F2d 253 (3d Cir. 1986).

[7] *See* Arnold v. United States Postal Service, 649 F Supp. 676 (D.D.C. 1986), and cases cited therein.

[8] 29 C.F.R. § 1625.9(f); Cipriano v. Board of Education of North Tonawanda, 785 F2d 51 (2d Cir. 1986).

problems arise when inducements are given to elect early retirement, especially when incentives are available only to employees in specified age groups.

Two types of early retirement incentive programs are most commonly offered. One is a "window plan" in which the employer provides enhanced benefits to employees who elect to retire only during a specified time, with no guarantee that such enhanced benefits will be offered any time after the window closes. Typically, these programs are designed to effectuate a prompt reduction in force. Given that motive, such plans frequently provide benefits to all employees eligible for retirement, although the benefit is often higher for younger employees and lower for older employees who are "closer" to retirement.

The second type of program is a permanent early retirement incentive, designed to encourage retirement prior to an employee's reaching normal retirement age. In most cases, enhanced benefits are provided only to employees within specified age groups, and employees at or near the normal retirement age receive little or no enhanced benefits. In these plans, too, the employer will often provide progressively declining benefits as employees become older.

Age discrimination problems arise in any incentive plan which limits eligibility based on age or reduces benefits progressively. Any permanent or window incentive program with either of these features would clearly appear to violate the provisions of Section 4(a)(1) of the ADEA[9] which makes it unlawful for an employer to discriminate against any individual with respect to his compensation because of his age. Were it not for Section 4(f)(2),[10] such retirement incentives, even if entirely voluntary, would be absolutely prohibited unless offered to all employees over the age of 40 on the same basis. Section 4(f)(2), however, provides that it shall not be unlawful for an employer:

> [T]o observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . .[11]

A number of recent decisions have focused on the two questions presented by Section 4(f)(2): 1) whether the retirement incentive program is "voluntary," and 2) whether the retirement incentive plan, as it may be structured in any case, is a bona fide employee benefit plan which is not a subterfuge to evade the purposes of the ADEA.

In analyzing any incentive plan, the threshold question is whether retirement under the plan is entirely voluntary, an issue discussed in two recent cases. In *Henn v. National Geographic Society*,[12] the Seventh Circuit addressed a decision by the employer to open a two month window incentive to its salespersons as a device to effectuate a reduction in the working force to cope with a downturn

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[9] 29 U.S.C. § 623(a)(1).

[10] 29 U.S.C. § 623(f)(2).

[11] *Id.*

[12] 819 F.2d 824 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987).

in sales. Twelve of fifteen eligible employees retired during the window. A lawsuit followed alleging that retirement under the plan was not "voluntary" because it was induced by the "terror of the alternative," a possible layoff. The Seventh Circuit had little difficulty in concluding that the layoff was a factor directly related to the company sales decline and not to the age of the individuals, that all individuals fully understood the options, and that the choice to retire, though excruciatingly difficult, was voluntary.[15]

The Second Circuit, by contrast, has placed a somewhat heavier burden on employers to show voluntariness. In *Paolillo v. Dresser Industries, Inc.*,[16] the court initially held that every retirement under an early retirement incentive plan creates a prima facie case of age discrimination, and concluded that the employer must show a solid business justification for the plan and must further prove that each decision to retire is undertaken "without undue strain."[17] The Second Circuit later withdrew its first *Paolillo* opinion, and issued a decision employing a somewhat gentler approach to the company's plan.[16] The court has now concluded that the burden of proving age discrimination remains entirely with the plaintiff, who must also prove that the retirement was not voluntary. Remanding the case to the district court for a determination of voluntariness, the Second Circuit held:

> We believe that it is relevant to the determination of voluntariness whether the employees received sufficient time to make a decision. Because of the magnitude of the decision to accept early retirement, employees must be given a reasonable amount of time to reflect and to weigh their options in order to make a considered choice. The amount of time reasonably required, though, will vary depending on the circumstances of each case.[17]

One of the first cases to address the question of what is a "bona fide" plan occurred in a school district context. In *Patterson v. Independent School District* No. 709,[18] the district adopted a plan by which teachers retiring at age 55 would be paid a retirement incentive of $10,000. This "carrot" was to be diminished by $500 for each year over age 55 until 60, and by $1,500 for each year thereafter. Plaintiff was over the age of 65 when the retirement incentive plan was adopted, and retired at age 67 without receiving an incentive payment. The Eighth Circuit discussed only the issue of whether the plan was a bona fide retirement plan qualifying under Section 4(f)(2) of the ADEA. Concluding that the incentive program was indeed a plan qualifying for treatment, and was bona fide because it provided "substantial benefits" for employees, the court held the plan permissible under the ADEA.[19]

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[15] 819 F.2d at 828.

[16] 813 F.2d 583 (2d Cir. 1987).

[17] *Id.* at 585.

[16] Paolillo v. Dresser Industries, Inc., 821 F.2d 81 (2d Cir. 1987).

[17] *Id.* at 84.

[18] 742 F.2d 465 (8th Cir. 1984).

[19] *Id.* at 468.

In another case involving a school district, the Second Circuit has taken the position not only that the retirement must be voluntary and pursuant to the terms of a bona fide retirement plan, but also that the plan must not be a subterfuge to evade the purposes of the ADEA. In *Cipriano v. Board of Education of North Tonawanda*,[20] the court reviewed a school district incentive program, pursuant to a collective bargaining agreement, which paid an incentive only to members of the bargaining unit between the ages of 55 and 60 who retired between July 1 and February 1 in any of the three years of the agreement. An employee, age 61 at the time the agreement was negotiated, alleged that the plan discriminated based on age. The court had no difficulty in concluding that the plan, which paid substantial benefits, was bona fide.[21] On the subterfuge issue, however, the court asserted that the employer bears the burden of showing that the incentive plan was "not a subterfuge to evade the purposes of" the ADEA:

> All that we now decide is that even in the case of voluntary early retirement plans the employer—and also here the union—must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as it did.[22]

The court failed to answer the question of precisely what evidence was required to show a legitimate business reason for the pension plan structure, and specifically invited guidance from the EEOC in making that determination. In remanding the case to the district court for further findings and to obtain information from the EEOC, the Second Circuit noted:

> We would not wish our decision here to be read as a disapproval of voluntary early retirement plans in general or of this plan in particular. The evidence of business reasons required to show that a voluntary early retirement plan is not a subterfuge would almost necessarily be less than what was required to make such a showing in the case of a mandatory plan. . . . We decline to speculate on the precise contours of that showing in light of the extremely scant record before us and without initial consideration by the district court. On the remand we are directing, the district court should seek the assistance of the EEOC, whether as an intervenor or *amicus curiae*; perhaps before the case is heard, that agency, after the lapse of seven years, may have issued its own guidelines with respect to the meaning of subterfuge as applied to the ADEA . . . .[23]

In response to the *Cipriano* decision, the EEOC has now filed a brief with the district court considering that case on remand. In its brief, the EEOC has taken the position that even in cases where older workers may not be eligible to participate in the plan, an employer may establish cost justification for a voluntary early retirement incentive program. In agreement with the Second Circuit opinion, the EEOC suggests that an employer must demonstrate a legitimate business reason not only for having an early retirement incentive plan, but also for having

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[20] 785 E2d 51 (2d Cir. 1986).

[21] *Id.* at 54.

[22] *Id.* at 58.

[23] *Id.* at 59.

the particular plan which has been adopted. According to the EEOC, that justification can best be established "where the specific age limitations are based on and reasonably supported by some objectively measured assessment of increasing cost and/or declining benefit to the employer in providing the retirement benefits."[24] The brief expressly sanctions unequal benefits to older workers, provided participation in the plan is voluntary "for all retirement-eligible employees," and provided there are legitimate business reasons for structuring the plan with defined age limitations.[25]

Another recent opinion also adopts the view that substantial cost justification is required if lesser benefits are offered to induce the retirement of older employees. In *Karlen v. City Colleges of Chicago*,[26] the amount of retirement incentive to employees age 55 to 64 far exceeded that offered to employees over 64. In denying the employer's motion for summary judgment, the Seventh Circuit held that a jury was entitled to examine the question of whether the plan, which offered "a whole carrot" to younger employees but took back half for workers age 65 to 69, was without sufficient cost justification and was therefore a subterfuge to evade the purposes of the ADEA.[27]

With such uncertainties about the extent to which individual plans may be considered voluntary or involuntary in inducing retirement, and the open question of the necessity of proving, and acceptable evidence, that a plan is not a subterfuge to evade the purposes of the Act, extreme caution must be taken in developing and implementing early retirement incentive programs. In establishing such programs, it may not be appropriate to simply follow the normal course of collective bargaining. Age limitations or dollar variations which depend on age cannot, under cases like *Cipriano or Karlen*, simply be the product of a negotiated compromise between the union's and the employer's offer. Rather, the plan must be developed, jointly with a union if necessary, based on objective assessments of cost benefits justifying the ages and numbers which are selected. It must also be carefully crafted and communicated delicately to employees to avoid a "voluntariness" challenge.

RES JUDICATA OR COLLATERAL ESTOPPEL EFFECT OF STATE AND LOCAL GOVERNMENT DETERMINATIONS

Where an employee of a school district, particularly a teacher, contests an employment discharge under the ADEA, the federal court proceedings may often be the second or third legal avenue which has been pursued. Quite frequently, a teacher will have contested the discharge through an administrative hearing, perhaps reviewed by a higher state administrative body or court. The teacher may also have applied for unemployment compensation and, in addition may well have filed age discrimination charges through a state deferral agency such as a Human Relations or Civil Rights Commission. Where administrative decisions

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[24] *See* 177 DLR A-6 (9/15/87).

[25] *Id.*

[26] 837 F2d 314 (7th Cir. 1988).

[27] *Id.* at 320.

holding that an employee was or was not discharged for appropriate reasons or for reasons relating to age discrimination have been made by duly constituted hearing boards, education departments, unemployment authorities or deferral agencies, are those decisions to be given collateral estoppel effect in a federal court action? The courts appear to be split on this issue.

The starting point is the Supreme Court opinion in *University of Tennessee v. Elliott*.[28] There, the Court held that unreviewed factual determinations by state agencies do not preclude de novo litigation of a Title VII claim, but may preclude a claim under 42 U.S.C. § 1983 if the state agency was acting in a judicial capacity in resolving factual issues, and the parties had an adequate opportunity to litigate the matter.[29]

In resolving the Title VII issue, the Court relied heavily on the language of Section 2000e-5(b) of the statute[30] requiring the EEOC to give "substantial weight to final findings and orders made by State or local authorities . . . ." The Court reasoned that Congress could not have legislated a mandate that the EEOC give "substantial weight" to state or local government determinations had it actually intended to give preclusive effect to such administrative decisions.[31] The ADEA analysis is complicated by an absence in the statute of a counterpart to Section 2000e-5(b) of Title VII.

A number of courts have addressed the collateral estoppel issue in the ADEA context, and the results have been mixed. In a pre-*Elliott* case, the Fourth Circuit concluded that an unreviewed administrative determination by a federal agency did not preclude ADEA litigation.[32]

The Seventh Circuit, following *Elliott*, has reached a similar conclusion. In *Duggan v. Board of Education of East Chicago Heights*,[33] the plaintiff, a tenured teacher, was dismissed for poor teaching performance after a nine day administrative hearing in which he was represented by counsel. At the hearing, Duggan raised issues of race and age discrimination, but the hearing officer failed to credit those allegations and upheld the discharge.

Shortly after the hearing officer's decision, Duggan filed suit in federal court asserting claims under Title VII, the ADEA, and 42 U.S.C. § 1983. The school board sought to dismiss each cause of action as barred by the doctrine of res judicata. The district court granted the motion and Duggan appealed. On appeal, the school district conceded that *Elliott* governed the Title VII issue and the court ruled that Duggan had waived his § 1983 claim.

On the ADEA issue, the Seventh Circuit concluded:

> . . . a thorough comparison of the deferral mechanisms of the ADEA, 29 U.S.C. § 633, and Title VII, 42 U.S.C. § 2000e-5, strongly suggests that, with respect to administrative res judicata, the two statutes should be construed alike.[34]

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[28] 106 S. Ct. 3220 (1986).

[29] *Id.* at 3227.

[30] 42 U.S.C. § 2000e-5(b).

[31] *Elliott*, 106 S. Ct. at 3225.

[32] Rosenfeld v. Department of the Army, 769 F2d 237 (4th Cir. 1985).

[33] 818 F2d 1291 (7th Cir. 1987).

[34] *Id.* at 1295.

In *Duggan*, the court further reasoned that Congress has authorized multiple forums to adjudicate both Title VII and ADEA claims, and did not intend the process to effectively stop at the state agency level before *any* court had the opportunity to consider the discrimination claim.[55] The court also pointed out that even EEOC administrative determinations do not preclude de novo judicial review, and that if unreviewed state administrative findings of fact were given res judicata effect, the concurrent or subsequent EEOC investigation would be superfluous.[56]

A contrary conclusion has been reached by the Ninth Circuit in *Mack v. South Bay Beer Distributors*.[57] Like *Duggan*, *Mack* was decided after the Supreme Court decision in *Elliott*. The court in *Mack*, without a significant discussion of the differences between Title VII and the ADEA, simply applied the same analysis to an ADEA claim that was applied to a § 1983 claim in *Elliott*. The court held that unreviewed administrative decisions of a state are entitled to preclusive effect if the stage agency acts in a "judicial capacity" to resolve the issues of fact properly before it and the parties had an adequate opportunity to litigate those issues.[58]

In *Mack*, the plaintiff was a salesman terminated for misconduct. When he sought unemployment compensation, the administrative law judge ruled that his termination was for "wanton disregard of his employer's interests." He did not appeal, but filed an ADEA claim in federal court. The Ninth Circuit concluded that although the unemployment board acted in a judicial capacity, neither party adequately litigated the age discrimination question before the state administrative agency.[59] In refusing to give preclusive effect to the unemployment compensation decision, the court held:

> If collateral estoppel is applied to federal issues implicitly determined in proceedings before the Unemployment Insurance Appeals Board, an employee with a federal discrimination claim might have to decide to forego state unemployment benefits rather than risk an adverse ruling that could have preclusive effect on a federal discrimination claim that he may not be adequately prepared to litigate before the Board. Moreover, the potentially higher awards at stake in discrimination claims could compel both employers and employees to litigate every unemployment benefits claim as if it encompassed a discrimination suit. Should this come to pass the Board may find it difficult to adjudicate unemployment benefit claims expeditiously.[60]

A slightly different twist was placed on the issue of unemployment compensation litigation by a district court in Connecticut in a pre-*Elliott* case.[61] There, plaintiff in an ADEA action had applied for unemployment compensation on the ground that she was constructively discharged. The state unemployment author-

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[55] *Id.*

[56] *Id.*

[57] 798 F.2d 1279 (9th Cir. 1986).

[58] *Id.* at 1283.

[59] *Id.*

[60] *Id.* at 1284.

[61] Rotert v. Jefferson Federal Savings and Loan Association, 623 F. Supp. 1114 (D. Conn. 1985).

ities denied her claim, and on review a state court concluded that she resigned from her job and was not constructively discharged. The district court compared her claim to one arising in *Kremer v. Chemical Construction Corp.*,[42] requiring federal courts to give preclusive effect in Title VII actions to state court rulings dismissing discrimination claims, and held that the state court determination that the plaintiff had not been a victim of constructive discharge, although occurring in an unemployment compensation context, was entitled to preclusive effect.[43]

The foregoing cases illustrate that the law in this area is in its formative stages. With respect to *unreviewed* administrative determinations of state and local governments, it appears that the Fourth and Seventh Circuits have concluded that they will not be given preclusive effect. After *Mack*, they *may* be given preclusive effect in the Ninth Circuit, and in other jurisdictions there is likely to be litigation on this issue. Under the Supreme Court decision in *Kremer*, decisions of state courts dismissing age discrimination claims are likely to be given preclusive effect in federal courts by analogy to Title VII, but it is as yet unclear whether other jurisdictions will follow the District Court of Connecticut in holding that court decisions on unemployment claims will be accorded such deference. The policy reasons for failing to accord them such deference in *Mack* appear to apply equally to reviewed and unreviewed unemployment decisions, and the uncertainty in this area of law is cause for every employer to consider carefully its response to unemployment compensation claims.

RELEASES AS WAIVERS OF ADEA RIGHTS

With the recent increase in age discrimination litigation, employers contemplating discharge or layoff of older employees have adopted a number of strategies to limit or avoid liability for ADEA claims. One of these is by "settling" the case in advance of litigation, or even before the employee has the opportunity to seek relief at the EEOC or a state agency. Typically, employers have attempted such settlements by making offers to terminated employees of consideration in the form of severance pay or continued benefits in return for a release.

In the Title VII context, the EEOC has honored and the courts have generally approved private, unsupervised waivers which are knowing and voluntary.[44] Additional controversy has developed over the application of such principles to the ADEA. There has been a flurry of recent activity dealing with the subject of waivers of ADEA rights which has focused on essentially three questions. The answers to these questions are critical in determining how to advise a client desiring to make efforts to part amicably with an employee without facing age discrimination litigation. These questions are:

1. Are private deals between an employer and an employee, if unsupervised by the EEOC, valid and binding at all, or are they void as a matter of law?

2. If releases may be valid, must they specifically waive ADEA rights?

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[42] 456 U.S. 461 (1982).

[43] *Rotert*, 623 F Supp. at 1120.

[44] United States v. Allegheny-Ludlum Industries, Inc., 517 F2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); EEOC v. Goodyear Aerospace Corp., 813 F2d 1539 (9th Cir. 1987); Rogers v. General Electric Co., 781 F2d 452 (5th Cir. 1986).

3. Under what circumstances is a release to be considered voluntary and knowing?

The Threshold Question - The Validly of Unsupervised Waivers

The first and perhaps most celebrated case to discuss this issue was *Runyan v. National Cash Register Corp.*[45] Runyan was an "in house" attorney for the employer, practicing in the field of labor law. In 1977, Runyan was notified that he was to be terminated for unsatisfactory performance. In ensuing discussions, he and the employer negotiated an agreement employing him for consulting services, and he signed a release. He later filed suit under the ADEA.

The district court upheld Runyan's release, and a Sixth Circuit panel reversed, holding that because the ADEA incorporates the enforcement provisions of the Fair Labor Standards Act of 1938 (FLSA),[46] the release was void as a matter of law.

Rehearing the case *en banc*, the full court affirmed the district court result. The court discussed at length Runyan's argument that the incorporation of FLSA enforcement provisions barred a waiver of his statutory rights. In concluding that it did not, the Sixth Circuit reviewed several FLSA cases.[47] The court noted that in *Brooklyn Savings Bank v. O'Neil*,[48] the Supreme Court has held that an employee cannot privately waive his right to FLSA damages for violation of the minimum wage or overtime provisions of the law. Later, in *Schulte, Inc. v. Gangi*,[49] the Supreme Court further held that even where there was a dispute over coverage of the FLSA, a claim could not be compromised. Subsequent cases have made distinctions between bona fide disputes over legal issues, for which FLSA settlement agreements are not valid, and bona fide disputes over factual issues, for which compromises may be binding.[50]

The *Runyan* court, observing that nothing in the ADEA discusses the question of whether rights may be privately released, focused on the existence of a bona fide dispute over whether NCR discharged Runyan in violation of the ADEA:

> The dispute is not over legal issues such as the ADEA's coverage or its applicability. Rather, the parties contest factual issues concerning the .....motivation and intent behind NCR's decision to discharge Runyan.[51]

In such a case, where there is a bona fide factual dispute, the court concluded that a release is not invalid as a matter of law.[52]

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[45] 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 107 S. Ct. 178 (1986).

[46] 29 U.S.C. §§ 201-219.

[47] *Runyan*, 787 F.2d at 1041-43.

[48] 324 U.S. 697 (1945).

[49] 328 U.S. 108 (1946).

[50] *See* Strand v. Garden Valley Telephone Co., 51 F. Supp. 898 (D. Minn. 1943); Rigopoulos v. Kervan, 47 F. Supp. 576 (S.D.N.Y. 1942); Weiss v. Testrite Instrument Co., 272 A.D. 696, 74 N.Y.S. 2d 673 (1947); Cassese v. Manufacturers Trust Co., 182 Misc. 344, 46 N.Y.S.2d 621 (N.Y.C.T. 1943).

[51] *Runyan*, 787 F.2d at 1044.

[52] *Id.*

Apparently in response to the controversy stirred by the initial panel opinion in *Runyan* and the subsequent *en banc* decision, the EEOC in July 1987 unanimously adopted a regulation, published in final form in the August 27, 1987 Federal Register.[53] This regulation permits waivers or releases under the ADEA without EEOC supervision or approval "provided that such waivers are knowing and voluntary." The relevant factors adopted by the EEOC in evaluating unsupervised waivers are the following:

1. The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;
2. A reasonable period of time was provided for employee deliberation;
3. The employee was encouraged to consult with an attorney.

These regulations became effective September 28, 1987, but were suspended by Congress, following a lobbying effort by the American Association of Retired Persons (AARP), as part of an appropriations bill passed in January, 1988.[54]

While the EEOC has vigorously defended its regulatory process,[55] it appears that Congress may continue to take an active role in deciding this issue.

Since the adoption of the EEOC regulations, but before congressional action, at least two courts approved knowing, voluntary waivers of ADEA rights in at least limited circumstances. In *EEOC v. Cosmair*, Inc.,[56] the Fifth Circuit declined to enforce a release on the specific facts of the case, but indicated in dicta that a voluntary release may validly waive an individual's right to recovery under the ADEA.[57] There, employee Terry, age 53, was terminated after 18 years of employment. The company offered to continue his salary and medical benefits for 37 weeks, later modified to 39 weeks, in exchange for a release specifically waiving "all actions, causes of action, claims and demands whatsoever including ... discrimination in employment on the basis of ... age."[58] Shortly after signing the release, Terry filed an age discrimination charge with the EEOC, and the employer terminated the payment of severance benefits. The EEOC was granted an injunction to force the resumption of benefits. On appeal, the Fifth Circuit affirmed, with modifications. While noting that a release may validly waive the right to individual relief, the court held that a waiver of the right to file a charge with the EEOC is against public policy.[59] According to the court, the purpose of a charge is not to seek individual recovery from the employer, but rather to inform the EEOC of possible discrimination.[60] While indicating that Terry may have no right

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[53] 29 C.F.R. § 1627.15 (1987).

[54] 208 DLR A-5 (10/29/87); 12 DLR A-11 (1/20/88).

[55] 237 DLR A-7 (12/11/87).

[56] 821 F.2d 1085 (5th Cir. 1987).

[57] *Id.* at 1091.

[58] *Id.* at 1087.

[59] *Id.* at 1090.

[60] *Id.*

of recovery individually because of the release, the court held that the employer could not cease severance compensation on the ground that a charge was filed.[61]

In *Lancaster v. Buerkle Buick Honda Co.*,[62] the Eighth Circuit joined the ranks of courts holding that an employee may waive his rights under the ADEA by signing an unsupervised general release. There, the parties bargained an agreement under which Buerkle agreed to pay severance pay and continue medical benefits, and also agreed not to restrict Lancaster's right to work for a competitor. In those circumstances, the release given in consideration of those terms was held to be binding.[63]

While the validity of any release depends upon the circumstances, it appears at present that the courts are likely to enforce "private deals" in appropriate cases. Given the AARP lobbying efforts, the concerns of Congress, and the still viable arguments for disapproving such waivers, there remains substantial uncertainty as to whether any release signed today will be effective to serve its intended purposes. It is certainly appropriate for attorneys to continue to settle amicably potential claims prior to litigation, but it may also be advisable when pursuing such efforts to be quite clear with clients that the enforceability of a release remains in some doubt and the possibility exists that even a knowing and voluntary waiver will not be enforced in the future.

In fact, in at least one case an employer's attempt to obtain a release of an employee's potential age discrimination claim backfired and resulted in the assessment of liquidated damages. In *Cassino v. Reichhold Chemicals, Inc.*,[64] an employee was terminated as part of a corporate reorganization. During a termination notification meeting, Reichhold offered Cassino $18,000 in exchange for his release of all claims, including his rights under the ADEA. Instead of enforcing the release, the Ninth Circuit approved the admission into evidence of the terms of the release to show that the employer's discrimination was willful,[65] and held that the jury could properly infer that the offered release showed reckless disregard for whether Cassino's firing violated the ADEA.[66]

The Necessity of Specifically Waiving ADEA Rights

As noted above, the EEOC has taken the position that a release must, in understandable language, clearly waive rights or claims under the ADEA. Several decided cases have also discussed that requirement, or have involved releases which meet that requirement. In *EEOC v. Cosmair, Inc.*,[67] the plaintiff released all actions, including any claims, "such as those under any federal, state or local law dealing with discrimination in employment on the basis of sex, race, national origin, religion, or age . . . ."

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[61] *Id.*

[62] 809 F.2d 539 (8th Cir.), *cert. denied*, 107 S. Ct. 3212 (1987).

[63] 809 F.2d at 540.

[64] 817 F.2d 1338 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 785 (1988).

[65] 817 F.2d at 1343.

[66] *Id.* at 1348.

[67] 821 F.2d 1085 (5th Cir. 1987).

Two appeals courts, at least in the circumstances of each case, have rejected the argument that a release must specifically mention the ADEA or age discrimination. In *Runyan v. National Cash Register Corp.*,[68] the plaintiff merely signed a general release. In a footnote, the court rejected his argument that a release must specifically refer to the ADEA, and concluded, "[i]n determining whether plaintiff knowingly and voluntarily waived his ADEA claims, we apply ordinary contract principals."[69] Of course, the plaintiff in *Runyan* was a labor lawyer presumably familiar with the import of a release. In *Lancaster v. Buerkle Buick Honda Co.*,[70] the employee released the company from "each and every claim of any kind . . . resulting from his termination of employment."[71] In Lancaster, the Eighth Circuit specifically held that in order to be effective, a waiver need not mention the ADEA, and concluded that his "broad release of all claims resulting from his termination" served to release his ADEA claim.[72]

Given the EEOC position and the limited number of courts which have passed upon the issue of whether there must be specific mention of the ADEA, it is clearly a preferred practice to draft a release which unambiguously relinquishes any rights under the ADEA and any other laws relating to age discrimination.

The Requirement that a Release Be Knowing and Voluntary

The suspended EEOC regulations require a reasonable period of time for employee deliberation and that the employee be encouraged to consult with an attorney. The same factors were mentioned by the Eighth Circuit in *Lancaster v. Buerkle Buick Honda Co.*, which upheld a release. Specifically, the court concluded the release was voluntary because it was written in simple language, because Lancaster had several days to review it before signing, and because he had the opportunity to consult an attorney and actually negotiate improvements.[73]

A decision worthy of careful review was recently issued by the Third Circuit in *Valenti v. International Mills Services, Inc.*.[74] In Valenti, the court extensively reviewed cases on the validity of releases, and adopted the principle that a knowing and voluntary relinquishment of claims under the ADEA is permissible for the resolution of factual disputes. The court concluded, however, that there was not voluntary relinquishment in the case before it.[75]

Upon the termination of his employment, Valenti was presented with a letter outlining the terms of his termination benefits. The letter contained a general release which he signed when notified that he was required to do so in order to realize the stated compensation package. Valenti attended a meeting with the company attorney to obtain an explanation of the letter, but testified that the

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[68] 787 F.2d 1039 (6th Cir.)(en banc), *cert. denied*, 107 S. Ct. 178 (1986).

[69] 787 F.2d at 1044 n.10.

[70] 809 F.2d 539 (8th Cir.), *cert. denied*, 107 S. Ct. 3212 (1987).

[71] 809 F.2d at 540.

[72] *Id.* at 540-541.

[73] *Id.* at 541.

[74] No. 84-1218 slip op. (3d Cir. December 29, 1987).

[75] *Id.*

entire explanation related to a noncompete agreement, and not to the issue of the release.

The Third Circuit held the release invalid:

> There was no bargaining process, no clarification of terms, no realistic explanation of the consequences of signing the release, nor any negotiation of the terms and conditions. There was therefore no valid release of his claims.[76]

In assessing the voluntariness of the release, the Third Circuit cited with approval the suspended EEOC regulations.

Valenti casts doubt upon any practice by an employer of attempting to dictate the terms of the severance arrangement immediately upon the discharge in order to obtain a prompt release. The Third Circuit was clearly troubled by the fact that Valenti was not given an opportunity to seek counsel, to discuss the terms of the compensation offer and to negotiate those terms, in essence, despite an apparent offer by the defendant corporation to provide a substantial compensation package to which Valenti was not entitled under any existing company policy. Under *Valenti* a generous severance package may not serve as consideration for a release unless the employer equalizes the bargaining power between it and the employee by permitting an opportunity to obtain counsel and negotiate. It may be advisable in such cases for employers to make a low opening offer to an employee and then to encourage the employee to obtain counsel, envisioning a bargaining process in which the employee will gain additional concessions to support a release.

THE AVAILABILITY OF LIQUIDATED DAMAGES FOR "WILLFUL" VIOLATIONS OF THE ADEA

In *Trans World Airlines, Inc. v. Thurston*,[77] the Supreme Court adopted a definition of "willful" sufficient to trigger the liquidated double damage provisions of the ADEA.[78] A review of *Thurston* and subsequent decisions on the issue is important for counsel in assessing how to advise clients about various types of personnel and employee benefit matters in cases where the ADEA may be invoked.

In *Thurston*, the airline and the Airline Pilots Association entered into a collective bargaining agreement requiring the retirement at age 60 of employees filling cockpit positions. Shortly thereafter, the 1978 Amendments to the ADEA prohibited the forced retirement of flight engineers at age 60. Following the amendments, the airline adopted a policy under which a captain could avoid mandatory retirement by obtaining "flight engineer status" prior to his 60th birthday. Several of the plaintiffs were retired upon reaching age 60 after being denied the opportunity to "bump" a less senior flight engineer. Because captains who were compelled to vacate their position for reasons other than age were

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[76] *Id.*

[77] 469 U.S. 111 (1985).

[78] *See* 29 U.S.C. § 626(b).

permitted such bumping rights, while captains approaching age 60 were not permitted to "bump," the Court held that TWA's policy violated the ADEA.[79]

In assessing whether the violation was "willful" the Supreme Court rejected a line of cases which held that the employer commits a willful violation if it knows that the ADEA is "in the picture."[80] Rather, the Court held that a violation is willful if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."[81] In holding that the conduct of TWA was not willful, the Court cited several elements of TWA's conduct. These elements included that the employer had sought the advice of counsel, that there were constraints under the collective bargaining agreement and the union had opposed a change, and that despite the collective bargaining agreement limitations, a policy was adopted which softened the age 60 retirement mandate. In consideration of these factors, the Court concluded that TWA officials acted reasonably and in good faith in attempting to determine whether the new plan would violate the ADEA.[82]

The application of the Thurston standard has not been uniform in the courts, and the split is best amplified by a review of recent Third, Tenth, and Eleventh Circuit opinions. One of the difficulties of the *Thurston* standard was thoroughly discussed by the Third Circuit in *Dreyer v. Arco Chemical Co.*,[83] in which the court noted that the "knew or showed reckless disregard" standard is particularly apt in cases in which there is a claimed policy which violates the ADEA, but "is not easily incorporated in cases alleging disparate treatment in a discrete employment situation."[84] In the latter type of case, according to the Third Circuit, there is a danger that use of the "knew or reckless disregard" standard "would in effect allow the recovery of liquidated damages any time there was a violation of the Act."[85] Believing that the Supreme Court had rejected such an interpretation in *Thurston*, the Third Circuit held:

> Because *Thurston* makes clear that we must interpret the liquidated damages provisions in a way that would not permit "an award of double damages in almost every case," we must seek a standard for willfulness that distinguishes between a violation, which is almost always intentional, and a willful violation, leading to double damages.[86]

Concluding that the Supreme Court in *Thurston* suggested that liquidated damages were to be considered punitive in nature, the court held:

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[79] *Thurston*, 469 U.S. at 124.

[80] Coleman v. Jiffy June Farms, Inc., 458 F2d 1139 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972); EEOC v. Central Kansas Medical Center, 705 F2d 1270 (10th Cir. 1983).

[81] *Thurston*, 469 U.S. at 128.

[82] *Id.* at 129.

[83] 801 F2d 651 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1348 (1987).

[84] 801 F2d at 656.

[85] *Id.* at 657.

[86] *Id.*

> Where an employer makes a decision such as termination of an employee because of age, the employer will or should have known that the conduct violated the Act. Nonetheless, in order that the liquidated damages be based on evidence that does not merely duplicate that needed for the compensatory damages, there must be some additional evidence of outrageous conduct.[87]

Finding no "aggravating factors" in *Dreyer*, the court refused to uphold the jury's finding of a willful violation.[88]

A contrast is found in the decision of the Eleventh Circuit Court of Appeals in *Spanier v. Morrison's Management Services, Inc.*.[89] There, an employee with a splendid job record was removed from her position, replaced by a 23 year old employee and later rejected for five openings for which she was qualified. Younger employees with less experience filled each of the five positions. In upholding an award of liquidated damages, the court approved a simple instruction to the jury defining "willfulness" as whether the employer knew, or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.[90] The Eleventh Circuit cited its earlier opinion in *Lindsey v. American Cast Iron Pipe Co.*,[91] in which it noted that like the Third Circuit in *Dreyer* it had difficulty reconciling the *Thurston* standard of "knew or showed reckless disregard" with the admonition of the Supreme Court in the same case to avoid imposing liability in every case. In *Lindsey* the Eleventh Circuit concluded that there was "no logical way" to reconcile a finding of intentional discrimination with a finding of good faith.[92] Despite the awkwardness the court saw in this dilemma, it declined to adopt the Third Circuit modification of the *Thurston* standard, essentially holding that a jury's finding of intentional discrimination after instructions to the jury covering the issue of good faith, coupled with the employer's admission of knowledge of the existence of the ADEA, justified an award of liquidated damages.[93] Under the standard enunciated by the Eleventh Circuit, any jury finding that the asserted reasons for discharge are a pretext, coupled with the employer's knowledge of the ADEA, will support a jury award of liquidated damages.

A compromise of sorts between the standards articulated in *Dreyer* and *Spanier* was reached by the Tenth Circuit in *Cooper v. Asplundh Tree Expert Co.*.[94] In *Cooper*, the jury found that age was a determining factor in Asplundh's decision to fire a 49-year-old employee and that the employer committed a "willful" violation of the ADEA.

The Tenth Circuit declined to follow the rationale in *Dreyer*, finding that the "outrageous standard" test was inconsistent with the Supreme Court's decision

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[87] *Id.* at 658.

[88] *Id.*

[89] 822 F2d 975 (11th Cir. 1987).

[90] *Id.* at 978.

[91] 810 F2d 1094 (11th Cir. 1987).

[92] *Id.* at 1100.

[93] *Id.*

[94] 836 F2d 1544 (10th Cir. 1988).

in *Thurston* because it engrafted the element of "evil motive" onto the ADEA "willful" standard.[95] Likewise, the Tenth Circuit discarded the Eleventh Circuit's *Spanier* and *Lindsey* approaches because of their effect in finding a willful violation whenever liability is established for an initial violation under the Act which would undermine congressional intent to retain a two tiered liability scheme.[96]

The Tenth Circuit articulated a "predominant factor" test for a finding of a willful violation. The court adopted the following standard:

> [A] basic finding of liability under the Act requires that age be at least one of possibly several "determinative factors" in the employer's conduct; for a willful violation to exist in a disparate treatment claim, a factfinder must find that age was the *predominant* factor in the employer's decision.[97]

From these courts' opinions, a clear paradox exists between the treatment of cases involving the disparate impact of an employer's policy and those dealing with cases of individual discharge. In the case of an employment "policy" which runs afoul of the ADEA, the employer's knowledge of the ADEA, its consultation with counsel and its intent may all mitigate against a willful violation, while in an individual discharge case, which requires proof of intent in the first place, such matters as consultation with counsel and knowledge of the application of the ADEA may mitigate in favor of the finding of a willful violation.

Obviously, where an attorney's advice may become the focal point of an important element of litigation, that advice is critical, and should be given with an awareness of the potential consequences to the client not only in the underlying litigation, but also as a piece of evidence in a determination of willfulness. Particularly in cases involving employee benefits, such as retirement policies, it appears critical for employers to consult with counsel and follow legal advice in making any decisions which could implicate the ADEA. In two cases since *Thurston*, the issue of "willfulness" appears to have turned on whether the public employer involved followed the advice of the state attorney general in making employment decisions.[98] In individual discrimination cases, it appears that if a view such as that expressed by the Eleventh Circuit is adopted, the correctness of the attorney's advice may be even more critical. Despite the investigation by counsel into the circumstances of the case and a conclusion reached that the employer may terminate any employee without violating the ADEA, a subsequent jury finding of intentional discrimination may lead to the further conclusion that the violation was willful.

The Supreme Court recently provided some clarification on the issue of what constitutes a willful violation of the ADEA. In *McLaughlin v. Richland Shoe Co.*,[99]

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[95] *Id.* at 1550.

[96] *Id.* at 1551.

[97] *Id.*

[98] EEOC v. Wyoming Retirement System, 771 F.2d 1425 (10th Cir. 1985); Kossman v. Calumet County, 800 F.2d 697 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1294 (1987).

[99] 108 S. Ct. 1677 (1988).

the Court adopted the reckless disregard standard of *Trans World Airlines v. Thurston* for determining willful violations of the Fair Labor Standards Act (FLSA). The Court clearly rejected the Department of Labor's standard that would find employers in willful violations of the FLSA and the ADEA if they take action without a reasonable basis. The Court believed this standard would ignore Congress' intent that findings of willfulness be based on something more than negligence or lack of good faith. The Court stated, " If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then . . . its action should not be . . . considered [willful] under the . . . standard we approve today."[100]

[100] *Id.* at 1682 n. 13.

Hazardous Waste Law Comes to the Schoolyard

by: G. Richard Hill and Beth A. Clark

INTRODUCTION

Hazardous waste[1] laws and regulations now affect all school districts in the nation. With the 1984 amendments to the Resource Conservation and Recovery Act ("RCRA"), and in particular, the adoption in 1986 of the Asbestos Hazard Emergency Response Act of 1986 ("AHERA"), school officials must pay attention to the rules of the new hazardous waste game. Failure to pay attention may result in costly consequences.

As property owners, buyers and sellers, school districts may find themselves jointly and severally liable for the cost of cleanup of property polluted by hazardous waste. This type of liability is shared by all property owners, buyers and sellers in the country.

Unique to school districts are the new responsibilities set forth in AHERA. AHERA imposes significant requirements for asbestos inspection, appropriate action when asbestos is found and training and accreditation of asbestos contractors.

The first part of this article summarizes the two major federal hazardous waste laws in this area, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA", commonly known as "Superfund"),[2] as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),[3] and the Resource Conservation and Recovery Act ("RCRA").[4] The second part explores the special liability of schools and school districts as a result of Congress' passage

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[1] Under the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6987 (1982 and Supp. 1986), a "hazardous waste" is a solid waste (defined in 40 C.F.R. § 261.2(a)(1)(1986)) that either (a) contains a substance listed as hazardous by the Environmental Protection Agency in 40 C.F.R. § 261.3 or (b) has characteristics of ignitability, corrosivity, reactivity or toxicity. *Id.* § 261.21-24. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 defines the term "hazardous waste" by reference to defined terms in federal pollution laws. 42 U.S.C. § 9601(14) (1982).

[2] Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C.S. §§ 9601-9657 (Law. Co-op. 1982 & Supp. 1986)).

[3] Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at scattered sections of Titles 10, 26, 29 and 42 U.S.C.).

[4] Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C.S. §§ 6901-6987 (Law. Co-op. 1982 & Supp. 1986)).

of AHERA and Environmental Protection Agency ("EPA") rules promulgated thereunder. Finally, the last segment discusses asbestos-related litigation, including a national class action by school districts against asbestos manufacturers, and a legal challenge by the asbestos industry of the EPA regulations promulgated pursuant to AHERA.

The major practice tips that this article emphasizes are straightforward. First, school districts and the attorneys who represent them must know the law pertaining to hazardous waste in order to protect their interests. Second, to avoid costly penalties and liabilities, school districts must comply with the law of hazardous waste. Third, school districts must be aware of appropriate circumstances in which to retain legal and engineering consultants to conduct environmental audits of school property and facilities to disclose hazardous waste problems and methods of limiting liabilities pertaining to hazardous waste. Finally, school districts and administrators must educate themselves on the new requirements imposed under AHERA and begin to evaluate and implement means of compliance.

CERCLA, SARA AND RCRA

Background

The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), deals primarily with cleaning past releases of hazardous substances to the environment. The primary purpose of CERCLA is to cause the identification and elimination from our environment of hazardous substances that are spilled or otherwise released as a result of human activity.[5] CERCLA empowers the EPA to prevent present or future releases of hazardous substances to the environment when such releases may cause or threaten to cause an imminent and substantial endangerment to human health or the environment.[6]

CERCLA Provisions in a Nutshell

- **Superfund**

CERCLA establishes a hazardous response trust fund ("Superfund").[7] The original amount appropriated was $1.6 billion for the first five years after enactment of CERCLA.[8] That funding has been increased to $8.5 billion for the five years following enactment of SARA in 1986.[9]

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[5] 42 U.S.C.S. §§ 9601-9657 (Law Co-op. 1982 & Supp. 1986).

[6] *Id.* § 9604.

[7] *Id.* § 9631-9633.

[8] *Id.*

[9] *Id.* § 9601.

- **Notification**

42 U.S.C. § 9603 requires the person in charge of a facility from which a hazardous substance is spilled or otherwise unlawfully released to the environment to report the release to the federal government as soon as the release is discovered. Failure to notify is a criminal violation.[10]

- **Investigation**

The act authorizes the EPA to undertake whatever investigations, studies and monitoring activities are necessary to determine the extent of hazardous substance releases and their environmental and health impacts.[11]

- **Remediation**

42 U.S.C. § 9604(a) authorizes the EPA to remove and take other remedial actions whenever any hazardous substance is released or there is a substantial threat of release into the environment which may present an imminent and substantial danger to the public health or welfare.[12] Hazardous substances are defined to include certain substances designated pursuant to the Clean Water Act,[13] Superfund, the Resource Conservation and Recovery Act, the Clean Air Act,[14] and the Toxic Substances Control Act.[15] The definition of hazardous substances in these acts is very broad.

- **Suits for Cleanup Costs Against Responsible Parties**

CERCLA also gives the federal government the authority to recover fund expenditures from four classes of persons who are referred to as "potentially responsible parties."[16]

Responsible parties are defined as follows:

(1) The current owner or operator of property from which a release is made or threatened (may include fee owners, tenants, and, in some circumstances, even lenders);

(2) Any prior owner or operator of property at the time any hazardous substances were placed on the property;

(3) Any person who arranged for disposal or treatment of such hazardous substances;

(4) Any person who transports such hazardous substances for disposal or treatment at property where there is a release or threatened release.

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[10] *Id.*, § 9603(b).

[11] *Id.* § 9604(b), (c).

[12] *Id.* § 9604(a).

[13] 33 U.S.C.S. §§ 1251-1376 (Law. Co-op. 1987).

[14] 42 U.S.C.S. §§ 7401-7642 (Law. Co-op. 1982 & Supp. 1986).

[15] 15 U.S.C.S. §§ 2601-2629 (Law. Co-op. 1982 & Supp. 1986).

[16] *Id.* § 9607.

Liability is joint and several, and as a result the party with the "deepest pockets" may have to bear the entire cost of cleanup, regardless of that party's knowledge or comparative contribution to the release.[17]

By statute, the only defenses available are:

(1) Acts of God,

(2) Acts of war,

(3) An act or omission of a third party, other than an employee, agent or contractor of the defendant, which act or omission was the sole cause of the release, or

(4) Any combination of the foregoing.

The potentially responsible party must establish that it exercised due care with respect to the hazardous substance, and took precautions against the reasonably foreseeable acts or omissions of any such third party (essentially a "third-party defense").

- **Suits Against Private Parties for Cleanup**

CERCLA also provides the EPA the authority to require private parties to remove and take remedial actions when the determination is made that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility. Agency actions may include administrative order violations including imposition of civil penalties up to $5,000 for each day of violation and punitive damages and civil judicial actions.[18]

SARA as Major Federal Recommitment to Superfund

The Superfund Amendments and Reauthorization Act ("SARA") became effective October 17, 1986. SARA is a wide ranging act that addresses a number of the problems connected with CERCLA and related issues. A description of some of the major provisions of SARA follows:

- **Acceleration of Superfund Activity**

SARA includes two major steps to accelerate Superfund activities. First, funding was increased from $1.6 billion for the first five years after enactment of CERCLA to $8.5 billion for the five years following the enactment of SARA.[19] Second, SARA imposes a series of schedules to be achieved to the maximum extent practicable.[20] Preliminary assessment of Superfund sites must be completed by January 1, 1988; site inspections where necessary must occur by January 1, 1989; and final evaluation for inclusion on the Superfund National Priorities List must take place by 1990. Physical onsite remedial work is to be commenced for at least 175 new sites in the 36 months after enactment and for an additional 200 sites in the

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[17] *See, e.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983).

[18] 42 U.S.C.A. § 9606.

[19] *Id.* § 9601.

[20] *Id.* § 9616.

following 24 months. This increased funding, combined with congressionally imposed schedules, should increase Superfund activity dramatically.

- **Expansion of EPA's Superfund Powers**

SARA gives the EPA a number of new and broadened powers. SARA prohibits judicial review of EPA action until the agency seeks to recover the costs of response under § 106, or requires action by the potentially responsible party (PRP) under § 107.[21] Even then, any review must be based only on the EPA administrative record and must uphold the EPA's action unless it is found to be arbitrary and capricious.[22]

SARA also provides the EPA with wide powers to obtain all relevant information, obtain access to a site or a facility without a warrant, and inspect the site or facility and take samples.[23] Failure to comply with an EPA administrative order requesting relevant information can result in a fine of $25,000 for each day of noncompliance.[24]

SARA clarifies the type of contractual relationship sufficient under CERCLA to impose liability. Under SARA, a contractual relationship will not eliminate the limited third-party defense if the purchaser can demonstrate that, *at the time of purchase*, it neither knew nor had reason to know of the existence of hazardous waste on the site. In order to show that it had no reason to know, the purchaser must have undertaken "all appropriate inquiry into the previous ownership and uses of the property."[25] Finally, if an innocent purchaser gains knowledge of the release or potential release of hazardous substances after acquiring the property, the purchaser loses the third-party defense if it transfers the site without disclosure.[26]

- **Encouragement of Settlement**

SARA encourages the EPA to enter into settlements with potentially responsible parties to clean up hazardous waste sites. SARA includes a "moratorium" procedure which the EPA may at its discretion invoke in order to provide a time frame for settlements. Such a procedure provides PRPs with time in which to make an offer to the EPA with regard to site cleanup and to negotiate a settlement before the EPA takes action of its own.[27]

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[21] *Id.* § 9613.

[22] *Id.*

[23] *Id.* § 9604.

[24] *Id.*

[25] *Id.* § 101(35)(B). (Under SARA, the court in determining whether "all appropriate inquiry" was made, shall "take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property and the ability to detect such contamination by appropriate inspection.").

[26] *Id.* § 101(35)(C).

[27] *Id.* § 9622.

SARA also authorizes a settling PRP to seek contributions from nonsettling PRPs and protects a settling PRP from later being forced to contribute to a nonsettling PRP's CERCLA liability.[28]

- **State and Private Involvement in Superfund**

SARA also requires the involvement of state officials and private citizen groups in the Superfund decision making process. Indeed, fund payments of up to $50,000 per site are authorized to help citizen groups pay for independent review of EPA action.[29]

- **Cleanup Standards Strengthened**

SARA also begins to answer one question that CERCLA left unanswered: how clean must the EPA make a Superfund site? In a nutshell, the EPA is required to attempt to comply with the maximum contaminant levels provided in the Clean Air Act; with several other enumerated federal statutes where applicable; and with any promulgated state standard, requirement, criterion or limitation that has been identified to the EPA and that is stricter than federal provisions. Prior EPA policy of allowing site cleanups that did not meet these standards is limited and discouraged.[30]

Conclusions for School Districts

The conclusions to be drawn from this analysis of CERCLA and SARA are straightforward. School districts should evaluate the extent to which property that they own or lease is affected by hazardous wastes. To the extent property is affected by hazardous waste, expert assistance should be obtained to evaluate how to minimize liabilities associated with that waste. Further, school districts should assure themselves that school officials and personnel, including teachers, staff and students, are complying with all hazardous waste laws, to avoid having their properties contaminated.

School districts interested in acquiring property should evaluate the property prior to acquisition to determine the presence of hazardous wastes. It is advisable to obtain an expert report regarding the history of site use; to have a preliminary physical inspection of the site for hazardous waste storage, ground or water pollution, underground or surface storage tanks, garbage dumping, unusual odors or methane gas, or other unusual circumstances; to inquire of the EPA, the Department of Ecology and local agencies with jurisdiction as to any information they may have regarding the property; to consider the potential for offsite pollution contaminating the site; and if any of these investigations suggest the presence of hazardous waste, to consult with an expert for further appropriate tests and remedial measures prior to property acquisition.

Finally, consideration should be given to legally documenting the obligations of the parties pertaining to hazardous waste. While such legal documentation

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[28] *Id.* § 9613.

[29] *Id.* §§ 9621(f) and 9617.

[30] *Id.* § 9621.

may not insulate a party from liability to the government, it may insure needed caution, on the one hand, and provide some measure of protection in the way of indemnification or contribution.

RCRA

• Introduction

The Resource Conservation and Recovery Act ("RCRA"),[31] was first adopted in 1976 and substantially amended in 1984. The 1984 amendments lowered the threshold of hazardous waste usage or production subject to RCRA to 100 kilograms or more per month. Many schools formerly exempt from RCRA now are subject to its requirements due to this lower threshold.

RCRA has been referred to as requiring "cradle to grave" regulation of hazardous waste.[32] It regulates the generation, handling, transporting, treatment, storage and disposal of hazardous wastes. Most schools frequently engage in at least one of these activities, whether in the classroom, e.g., chemicals used in chemistry and physics laboratories; in extra-curricular activities, e.g., toxic developing solutions used in the campus print or photography shop; or in the physical plant, e.g., chlorine may be used in a swimming pool or electrical shops may have transformers containing polychlorinated biphenyls ("PCBs"). Accordingly, close attention must be paid to the requirements of RCRA. Meeting those requirements may impose substantial costs and liabilities upon school districts. Failing to meet those requirements, however, is likely to result in even greater liabilities.

• RCRA Provisions in a Nutshell

Identification of Hazardous Wastes. RCRA requires the EPA to define, identify and list hazardous wastes.[33] Hazardous wastes are defined at 40 C.F.R. Part 261 in two ways: (a) by listing certain specific wastes[34] and (b) by defining those characteristics of substances which render them "hazardous."[35] Those characteristics are ignitability, corrosivity, reactivity, and EP toxicity. Despite the EPA definition, one of the more difficult questions facing both regulators and the regulated community has been uncertainty as to what is and is not going to be deemed a "hazardous waste." Essentially, however, it appears that hazardous substances which have served their original intended use or are a by-product, and which are sometimes re-used or sold commercially and sometimes discarded, will be deemed to be hazardous wastes, regardless of the present intention of their possessor.[36] It should be noted that "hazardous waste," regulated by RCRA, is a subset of "hazardous substance," regulated by CERCLA. CERCLA's reach is broader.

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[31] 42 U.S.C.S. §§ 6901-6987 (Law. Co-op. 1982 & Supp. 1986).

[32] *Id.* §§ 6921-6925 (Law Co-op. 1982 & Supp. 1986).

[33] *Id.* § 6921.

[34] 40 C.F.R. §§ 261.20-261.33.

[35] 40 C.F.R. §§ 261.20-261.24.

[36] *See, e.g.*, United States v. A & F Materials, 582 F. Supp. 842 (S.D. Ill. 1984).

Generator, Transporter and Disposal Standards. RCRA imposes upon the EPA the responsibility to develop standards for hazardous waste handling by generators, transporters, and those who treat, store or dispose of hazardous waste.[37] Generators must comply with recordkeeping, reporting and storage regulations.[38] Transporters are charged with recordkeeping, safety and discharge cleanup regulations.[39] Both civil and criminal penalties are imposed for noncompliance.[40]

State Operation of RCRA Programs. RCRA authorizes states to operate the RCRA program in lieu of the EPA under certain conditions.[41] When a state's program is found to be "substantially equivalent" to the EPA program, the state may be granted interim authorization to operate the RCRA program in lieu of the EPA. If the EPA finds that a state has a program "equivalent" to the federal program, final authorization to operate the RCRA program can be granted.

When a state is operating the RCRA program on either an interim or final basis, any action taken by the state has the same force and effect as action taken by the EPA under RCRA.[42] State-issued permits have the force of both state and federal law. In most cases, state hazardous waste regulations will control rather than EPA regulations. In fact, state enforcement actions may have *res judicata* or collateral estoppel effects regarding any subsequent attempts by the EPA to take a parallel or contrary action.[43]

State and Federal Enforcement Options. RCRA provides a number of enforcement options to the state and federal governments.[44] Federal enforcement authority exists even when a state is the permit-issuing authority. Enforcement authority includes administrative compliance orders, administrative civil penalty assessments, injunctive authority, judicial civil penalty imposition, criminal penalties, emergency endangerment relief, inspection authority, and monitoring, analysis and testing authority.

Citizen Suits. 42 U.S.C. § 6972 provides for citizen suits to enforce RCRA. Citizen suits are allowed when the disposal of solid or hazardous waste may present an imminent and substantial endangerment to health or the environment, unless either the EPA or the state is diligently bringing and prosecuting an action under RCRA or CERCLA, or has settled the action by entering into a consent decree.

Whistle-Blower Protection. RCRA protects those who initiate proceedings or provide facts relating to enforcement of RCRA. Employers are prohibited from terminating or otherwise discriminating against such employees.[45]

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[37] 42 U.S.C.S. §§ 6922-6924.

[38] *Id.*; 40 C.F.R. Part 262.

[39] 40 C.F.R. Part 263.

[40] 42 U.S.C.S. § 6928 (Law. Co-op. 1982 & Supp. 1986).

[41] *Id.* § 6926.

[42] *Id.* § 6926(d).

[43] *See* United States v. ITT Rayonier, 627 F.2d 996 (9th Cir. 1980).

[44] 42 U.S.C.S. §§ 6928 and 6923.

[45] *Id.* § 6971.

Persons Responsible for RCRA Violations. Any "person" who violates RCRA or regulations promulgated thereunder is liable for civil or criminal penalties.[46] "Person" is defined under RCRA broadly to include:

> "[A]n individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, state, municipality, commission, political subdivision of a state, or any interstate body."[47]

Corporate officers and directors may be held personally liable for civil and criminal penalties under RCRA.

Conclusions for School Districts

The amendments to RCRA impose far-reaching requirements upon entities such as schools which store relatively minimal quantities of hazardous wastes on their premises. The liability for failure to meet the requirements of RCRA and its 1984 amendments is significant.

Schools must become aware of the requirements of applicable law, and comply with those requirements in their day-to-day operations. Failure to comply may result in substantial, personal, civil and criminal penalties, in addition to health hazards to students, teachers, employees and others.

ASBESTOS AND THE ASBESTOS HAZARD EMERGENCY RESPONSE ACT OF 1986

History of Asbestos Use

The use of asbestos has been noted since the beginning of recorded history. Ancient Egyptians used asbestos as embalming cloth. The Romans used the mineral for cremation wrappings. Asbestos clothing was used in China in the thirteenth century.[48] Asbestos use, however, did not become widespread until the late nineteenth century. As the availability of asbestos grew, so did the types of products in which the fiber was used. Asbestos consumption jumped during World War II with the Navy's demand that the mineral be used as fire-proofing in ships.[49]

Asbestos also was used as a fire retardant and as sound insulation in almost every high-rise building erected from the 1950s to 1972, when it was banned. In 1984, the EPA estimated that about 733,000 public, commercial, and residential buildings in the United States contained some form of asbestos. Congressional hearings in 1986 established that an estimated 15 million school children and 1.4 million employees occupy some 31,000 schools that contain friable asbestos-

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[46] *Id.* § 6928.

[47] 42 U.S.C.S. § 6903 (15).

[48] *See* Bureau of National Affairs, Inc., *Asbestos Abatement: Risks and Responsibilities* 2 (1987).

[49] *Id.*

containing material.[50] "Friable" building materials are those that can be crumbled to dust with hand pressure.

Health Impacts

Asbestos is released into the air from the natural deterioration of the adhesives which hold it in place, a process that can be hastened by water damage, vandalism and routine building maintenance and construction. Exposure to asbestos fibers first was linked to respiratory health effects in the early 1900's.[51] Based on current scientific studies, four major diseases or health changes are associated with asbestos exposure, including lung cancer, mesothelioma, pulmonary asbestosis and pleural plaques.[52]

The National Research Council has established that lung cancer is responsible for approximately 100,000 deaths annually in the United States. Those deaths related to asbestos inhalation represent the largest number of deaths connected with asbestos.[53]

History of the Asbestos Hazard Emergency Response Act of 1986

In 1986, Congress passed the Asbestos Hazard Emergency Response Act ("AHERA") as a new Title II of the Toxic Substances Control Act ("TSCA").[54] The Act orders school systems throughout the United States to inspect their buildings for asbestos, determine where asbestos-containing materials pose hazards to humans, and abate those hazards.

AHERA builds upon and extends a rule promulgated under Section 6 of TSCA in 1982. That rule required a one-time only inspection of school premises for the presence of friable-only asbestos. Where such asbestos was found, the school officials were required to notify parents and to retain certain records. This program was criticized by school boards and teachers' unions in 1983, however, because the federal government did not offer any funding for the inspections, nor did it provide any guidelines on issues such as abatement safety or the type and quantity of asbestos deemed "hazardous".[55]

In 1984, Congress passed the Asbestos School Hazard Abatement Act.[56] The 1984 Act provided for the first time a loan and grant program to help schools fund asbestos abatement actions. Although the Act authorized aid in the amount of $100 million annually, the program ultimately received at the most $50 million

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[50] EPA Efforts to Control Asbestos Hazards: Hearings on the Asbestos Hazard Emergency Response Act of 1986 Before the Subcommittee on Commerce, Transportation, and Tourism of the House Committee on Energy and Commerce, 99th Cong., 1st and 2d Sess. (1986).

[51] *See Asbestos Abatement, supra* note 48, at 2.

[52] *Id.* at 3.

[53] *Id.*

[54] Pub. L. No. 99-519, 100 Stat. 2970 (codified primarily at 15 U.S.C. §§ 2641-2654 (Supp. 1988)).

[55] *See Asbestos Abatement, supra* note 48, at 7.

[56] Pub. L. No. 98-377, Title V, 98 Stat. 1287 (codified at 20 U.S.C. §§ 4011-4021).

through fiscal 1986.[57] The law's premise remained that abatement is a state and local responsibility, and Congress required only that schools *inspect* for asbestos. Schools were required to inform the community and parents of any asbestos discovered.[58]

In 1986, AHERA made a remarkably swift journey through Congress and was signed into law October 22, 1987. Congressional observers attribute the swift passage to careful planning, a strong and organized lobby, the emotional message of school children exposed to potentially hazardous asbestos and a bipartisan desire to end the asbestos-in-schools debates.[59]

Major Provisions of AHERA

- **Section 202; Definitions**

(a) "Asbestos-containing material" or "ACM" is any material which contains more than one percent asbestos by weight.

(b) "Friable asbestos" is any asbestos-containing material applied on ceilings, walls, structural members, piping, duct work, or any other part of a building which when dry may be crumbled, pulverized, or reduced to powder "by hand pressure". The term also includes non-friable asbestos-containing material after it becomes damaged to the extent that it may be crumbled or pulverized by hand pressure.

(c) "Local educational agency" or "LEA" is:

(1) any local educational agency as defined in Section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381);

(2) the owner of any private, nonprofit elementary or secondary school building; and

(3) the governing authority of any school operated under the Defense Dependants' Education Act of 1978 (20 U.S.C. 921 *et seq.*).

(d) "Response actions" are all activities intended to protect human health and the environment from ACMs, including methods described in Chapters 3 and 5 of the EPA's Guidance For Controlling Asbestos-Containing Materials in Buildings.

(e) "School building" means:

(1) any structure suitable for use as a classroom, including a school facility such as a laboratory, school eating facility or facility used for the preparation of food;

(2) any gymnasium or other facility which is specially designed for athletic or recreational activities for an academic cause in physical education;

(3) any other facility used for the instruction of students or for the administration of educational or research programs; and

(4) any maintenance, storage or utility facility, including any hallway, essential to the operation of of any facility described in (1) through (3) above.

The above definitions include school buildings regardless of whether they are owned, leased or otherwise used by an LEA.

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[57] *Asbestos Abatement, supra* note 48, at 8.

[58] *Id.*

[59] *Id.* at 2.

- **LEA General Responsibilities**

The EPA regulations promulgated pursuant to AHERA ("AHERA Regulations")[60] require LEAs to ensure generally that:

(a) Inspections, reinspections and periodic surveillance and response actions are carried out;

(b) Custodial and maintenance employees are properly trained as required by the AHERA Regulations;

(c) Workers and building occupants are informed annually about inspections and response actions;

(d) Short-term workers (e.g., temporary repair persons) who may come in contact with asbestos in a school are provided information about the location of ACMs;

(e) Warning labels are posted adjacent to friable and non-friable ACMs; and

(f) Management plans are prepared and available for review.

- **Inspection and Response Actions**

AHERA requires all schools to inspect buildings for the presence of ACMs using certified personnel, unless an adequate inspection was performed prior to AHERA's enactment. It is important to note that inspections that complied with the EPA inspection rule of 1982 may not be adequate under AHERA. That rule required identification of friable asbestos only. AHERA requires inspection of all asbestos-containing materials, friable or not.[61]

Identified friable ACMs are subject to a variety of response actions. The AHERA Regulations list five major response actions—maintenance, repair, encapsulation, enclosure and removal—and describe appropriate conditions under which they may be used by the LEA.[62]

The LEA is required to select and implement in a timely manner the appropriate response action, using accredited personnel to design and conduct the response action. LEAs are further required to periodically survey and reinspect any ACMs that remain in a building, conduct maintenance programs to prevent exposure and educate school employees about the location of and safety precautions for the ACMs. Reinspections by accredited inspectors must be conducted once every three years.[63]

- **Management Plans**

On or before May 9, 1989, management plans must be developed for *all school buildings* found to contain asbestos-containing material and submitted to the governor in the state the LEA is located.[64] The management plan must be developed by an accredited management planner and must include a variety of

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[60] 40 C.F.R. § 763.84.

[61] 20 U.S.C. § 2644(b) (Supp. 1988).

[62] 40 C.F.R. § 763.90.

[63] 40 C.F.R. § 763.85(b).

[64] Pub. L. No. 100-368, 102 Stat. 829 (1988).

elements, including inspection results, response actions taken and planned, estimated cost of implementation, names and addresses of all contractors used on the site, test results, etc.[65]

Implementation of management plans must begin on or before July 9, 1989 and must be completed in a "timely fashion".[66] A copy of the management plan must be available in the administrative offices of the LEA for inspection by parents and the public.

- **The Role of the State**

By October 1987, all governors were to have informed the school districts in their respective state where to submit management plans for review. Under AHERA, states may establish administrative procedures for reviewing management plans, but are not required to do so.

The governor has the right to disapprove a management plan within 90 days of submission, if the plan does not conform with the AHERA Regulations or is otherwise inadequate. The governor is not required to affirm a management plan, however, and silence is deemed approval. If the governor disapproves a plan, the LEA has 30 days to amend it.[67]

Governors (or the EPA) may take emergency action with respect to any school if:

(a) the presence of airborne asbestos or the condition of friable material containing asbestos poses an "imminent and substantial endangerment to human health or the environment"; and

(b) the LEA is not taking sufficient action to respond.[68]

Governors (or the EPA) may seek reimbursement for all costs associated with such emergency actions.

- **Enforcement**

Rather than adopt the enforcement provisions of TSCA, Congress adopted a civil penalty scheme for noncompliance with AHERA deadlines. Section 207 of AHERA provides authority for the levying of penalties of up to $5,000 per day, per school. A school district is liable for such a penalty if it:

(a) fails to conduct a proper inspection;

(b) knowingly submits false information to the governor regarding inspections; or

(c) fails to develop a management plan.

In determining the amount of a proposed penalty, the EPA must consider the significance of the violation, the culpability of the violator and the LEA's ability to pay.

AHERA requires the courts to order that any fines so collected are to be returned to the LEA for use in complying with the regulations. Any unspent

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[65] 40 C.F.R. § 763.93.

[66] *Id.*

[67] 20 U.S.C. § 2645(c)(2) (Supp. 1988).

[68] *Id.* § 2648(a).

portion must be deposited in the Asbestos Trust Fund created under AHERA (discussed below).

- **State and Federal Law**

AHERA does not preempt any other state or federal law and preserves the right of each state to develop more stringent requirements.[69] AHERA preserves the right of any court to award costs and damages associated with asbestos abatement, at any time prior to the date on which the asbestos is removed.

Section 209 states that it was not the intent of Congress in adopting AHERA to create a cause of action or influence, in either plaintiff's or defendant's favor, the outcome or disposal of any civil action relating to asbestos.

- **Funding**

AHERA establishes an Asbestos Trust Fund and, by amendment to the Asbestos School Hazard Abatement Act of 1984, authorizes "repayable advances" of $25 million to the Asbestos Trust Fund for fiscal years 1987 through 1990. In addition, as noted above the Asbestos Trust Fund is the recipient of excess monetary penalties from civil actions, and repayments on loans made under Section 505 of the 1984 statute after January 1, 1987.

Conclusion

Under the AHERA Regulations, some 107,000 public and private primary and secondary school buildings will have to be inspected.

The EPA has estimated that the cost of a typical school asbestos program will be about $5,530 per school year. However, districts which have sought estimates of the cost of compliance with AHERA have been given quotes of $5,000 to over $15,000 per building.[70] At either figure, the tab for the cost of compliance is staggering.

The EPA has estimated that response actions of *some kind* will have to be taken at some 46,000 school buildings at a cost of $3 billion over the next 30 years. Industry officials say the costs could go much higher.[71]

In response to heavy criticism which had been levelled at Congress and the EPA because of the implementation deadlines set forth in the statute, Congress extended the original deadline from October 12, 1988 to May 9, 1989. Many school districts felt that the October 1988 deadline for inspection of all buildings by certified inspectors and development of management plans was patently impossible to meet.[72] Even the EPA had stated that based on comments received, it was "concerned about the ability of LEAs to complete and submit management plans by October 12, 1988."[73] The National School Boards Association had taken

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[69] *Id.* § 2649(a), (c).

[70] NSBA Comments on Proposed Rule on Asbestos-Containing Materials In Schools, June 29, 1987.

[71] *U.S. Issues Asbestos Safety Regulations For Schools*, New York Times, October 21, 1987.

[72] NSBA Comments, *supra*, note 70.

[73] 40 C.F.R. Part 763, Supplemental Information, III.A.

the position that Congress should extend the deadline until June 1990, and should increase significantly the funding for asbestos abatement.[74] For large districts with many hundreds of school buildings to manage, even meeting the new deadline will be a formidable task.

LITIGATION

Introduction

Until about 1984, most asbestos plaintiffs were victims of asbestos-related injuries, asserting personal injury claims. However, beginning in about 1980, asbestos property damage claims have been filed with increasing frequency.

Property damage claims, filed against the same refiners, manufacturers and suppliers named as defendants in personal injury cases, generally seek recovery of the costs of inspecting for and abating the hazards of asbestos in buildings.[75]

This is not to suggest that personal injury asbestos claims are on the decline or that school districts need not be concerned about such actions. In fact, a school district in Yonkers, New York recently was sued in federal district court by the estate of a Yonkers school system graduate who died in 1986 of asbestos-related cancer.[76] The estate, which is asking in excess of $20 million in damages, claims that the plaintiff was exposed to asbestos during the years he spent in Yonkers schools and that the district knew or should have known about the hazards posed by asbestos and acted to remove the materials.[77]

The controversy regarding asbestos in schools is an important aspect of the asbestos property damage claims emerging in the courts. It has been estimated that more than 300 school districts have filed suit in 16 federal district courts and 27 state courts to hold asbestos manufacturers and suppliers liable for abatement costs.[78]

The school district cases are product liability actions seeking to compel the manufacturers to remove, contain or repair the products or to reimburse school districts for abatement costs. Typically, the actions allege that the presence of asbestos creates a health hazard that makes abatement necessary; and that the defendants are liable for the remediation program costs.[79]

In Re: Asbestos School Litigation

On September 28, 1984, the U.S. District Court for the Eastern District of Pennsylvania certified a national class of all elementary and secondary public school districts and non-profit private schools in an action against some 50 asbestos manufacturers and installers. The original claims were brought by the following school districts: the School District of Lancaster (Penn.), the Manheim

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[74] *Asbestos Deadlines Unreasonable*, School Board News, Dec. 23, 1987.

[75] *See Asbestos Abatement, supra* note 48, at 89.

[76] School Board News, Oct. 21, 1987 at 1.

[77] *Id.*

[78] *See Asbestos Abatement, supra* note 48, at 90.

[79] *Id.*

Township School District (Penn.), the Lampeter-Strasburg School District (Penn.), the Barnwell School District No. 45 (S. Carolina), the Board of Education of the Memphis City Schools (Tenn.) and the Napa Valley Unified School District (Calif.).

The complaints allege that friable asbestos-containing materials have been used in school buildings. The complaints seek compensatory damages, punitive damages, and equitable relief, and allege that the defendants should bear the cost of identification, analysis, repair, removal, and replacement of the products. Plaintiffs' theories of liability include negligence, strict liability in tort, breach of warranty, intentional tort, concert of action and civil conspiracy.[80]

On September 21, 1987, the district court sent all school districts in the country notification of the class action. The notice specified that each district would automatically be a member of the class unless the district "opted-out" of the class in writing by December 1, 1987. To date, about 1,500-2,000 school districts have opted out of the class.

Substantive discovery is scheduled to begin February 1, 1988. It is estimated that discovery alone will take one to one and one-half years to complete.

Safe Buildings Alliance v. U.S. Environmental Protection Agency

As noted above, the EPA issued a final rule on asbestos-containing materials in schools, pursuant to AHERA. The final rule was effective for purposes of judicial review on November 13, 1987. On November 13, 1987, a lobbying arm of former asbestos manufacturers, "Safe Buildings Alliance", filed a petition for expedited review of the AHERA Regulations in the U.S. Court of Appeals for the District of Columbia. Safe Buildings Alliance was joined subsequently in its petition by National Gypsum Company and United States Gypsum Company. (National Gypsum and many of the members of Safe Buildings Alliance also are defendants in *In Re: Asbestos School Litigation, supra.*)

Other entities, including the District of Columbia, 31 individual states, GAF Corporation, a chemical and building products manufacturer, and various parent, teacher and union organizations, sought and were granted leave to intervene.

On January 12, 1988, the National School Boards Association ("NSBA") and Barnwell School District No. 45 (also a named plaintiff in *In Re: Asbestos School Litigation*), sought leave to intervene on the side of the EPA in the petition for review. Two primary reasons were cited for such intervention: 1) no other party before the court represents the local interests and concerns of those charged with day-to-day implementation of the regulations; and 2) the concern that SBA may seek to undermine the legal claims of the plaintiff class in *In Re: Asbestos School Litigation* by attack on the premises underlying the EPA regulations.[81]

The court of appeals granted the petition of NSBA and Barnwell to intervene. The American Association of School Administrators also intervened in the action, and challenged the EPA's implementation deadlines.

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[80] In Re: Asbestos School Litigation, No. 83-0268, (E.D. Pa. filed January 17, 1983).

[81] Motion of National School Boards Association and Barnwell School District For Leave to Intervene, Safe Buildings Alliance v. U.S. Environmental Protection Agency, 846 F.2d 79 (D.C. Cir. 1988).

The court granted expedited review of this matter. On January 22, 1988, petitioners filed a consolidated brief asking the court to set aside the AHERA Regulations. The petitioners argued that the EPA: 1) failed to determine what level of exposure to asbestos is "safe"; 2) failed to provide criteria for distinguishing safe schools from unsafe schools; 3) jeopardized rather than protected human health by authorizing removal of asbestos, without demonstrating that removal will make schools safer than regular maintenance; and 4) failed to provide detailed directions to schools and thereby abdicated its responsibility under AHERA to local schools and private contractors.[82]

On May 10, 1988 the court of appeals decision rejected the petitioners' challenge to the AHERA regulations.[83] The court found that the regulations which require schools to inspect for asbestos hazards and to choose certain approved responses were a reasonable interpretation of the statute. The court ruled that the EPA did not have to first determine what levels of asbestos exposure are safe before defining response actions sufficient to protect human health and the environment from the dangers of asbestos-containing materials in schools.

CONCLUSION

Hazardous waste once appeared to be a problem of concern only to major industrial polluters. As the law of hazardous waste exists today, however, and as it is certainly to develop in the future, hazardous waste will be an issue of concern for school districts. Any school that has an underground storage tank, or buys, sells or leases real property that may be affected by hazardous waste, asbestos, PCBs, or other toxic substances, must pay close attention to the risks and liabilities associated with these laws and regulations. Likewise, any school that stores and uses toxic substances, e.g., chemicals, developing and printing fluids, chlorine, etc., must establish and obey strict operating and disposal techniques. Failure to pay attention or failure to legally protect one's position, can result in substantial financial liabilities, and civil and criminal penalties.

Of perhaps more immediate concern to schools are the substantial burdens with respect to asbestos imposed by AHERA. School districts must begin immediately to inventory buildings, locate asbestos-containing materials and develop a management plan. The penalties for failure to acccomplish such tasks in a timely manner may be severe.*

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[82] Joint Brief of Petitioners, Safe Buildings Alliance v. U.S. Environmental Protection Agency, 846 F.2d 79 (D.C. Cir. 1988).

[83] 846 F.2d 79 (D.C. Cir. 1988).

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The Supreme Court's Affirmative Action Decisions: Implications for School Boards

by: Elliot M. Mincberg

Over the last two years, the Supreme Court has issued a number of key decisions concerning the use of affirmative action. These decisions have significant ramifications for school boards and other employers across the country. This article will consider the issue of affirmative action and the impact of the Court's rulings on school boards by examining the Court's decisions, reviewing subsequent lower court decisions concerning affirmative action, and discussing several key questions concerning affirmative action in light of the Supreme Court's decisions.

THE SUPREME COURT'S AFFIRMATIVE ACTION DECISIONS

Six Supreme Court rulings in 1986-88 specifically concern affirmative action. The Court's decisions in this area clearly establish that school boards and other public and private employers may undertake voluntary affirmative action programs under some circumstances. The decisions also affirm that courts may sometimes order employers found guilty of discrimination to adopt affirmative action. But in all these cases, the justices remained seriously divided concerning affirmative action. In fact, the justices wrote 25 separate opinions in the six cases, and split 4-4 on one aspect of their most recent affirmative action ruling. The result is that key questions remain unresolved concerning what types of affirmative action are permissible and under what circumstances.

The Supreme Court's Affirmative Action Decisions in 1986

The decisions by the Court concern affirmative action in three types of situations—voluntary affirmative action plans, consent agreements including affirmative action as a settlement of job discrimination suits, and court-ordered affirmative action plans. The first voluntary plan considered by the Court was a provision in a collective bargaining agreement reached by the Jackson, Michigan school board. The plan provided that in the event of teacher lay-offs, the percentage of minority personnel laid off would be no greater than the percentage of minority personnel employed by the school system at the time of the lay-offs. The Jackson school board argued that this provision was important to preserve

the gains it had achieved through its affirmative action hiring program. Several laid-off white teachers challenged the plan, but two lower courts ruled that the lay-off provision was constitutional and upheld the plan.

In *Wygant v. Jackson Board of Education*,[1] a 5-4 decision including five separate opinions by the justices, the Supreme Court reversed the lower court decisions and invalidated the lay-off plan. Because of the multiple opinions issued by the Court, there is no single controlling rationale for the Court's decision.[2] All five of the justices in the majority appeared to conclude that the lay-off provision was too severe in its impact on non-minority employees and too broad to be justified as an affirmative action measure under the circumstances.[3] At least four of these five justices concluded that the school board's goals of remedying general societal discrimination against minorities and providing role models for minority students were insufficient to justify the board's affirmative action lay-off plan.[4] These four justices agreed that a public employer could justify affirmative action based on evidence of past discrimination by the public employer itself, but concluded that the Jackson school board did not present sufficient evidence of such discrimination.[5]

The Court's second affirmative action decisions in 1986, *Local 28 of the Sheet Metal Workers' International Association v. EEOC*,[6] concerned the validity of a lower court decision which found a New York local sheet metal workers' union guilty of discrimination against minority workers. The lower court ordered the union not only to cease its discriminatory conduct, but also to adopt an affirmative action program including a special fund to recruit and train minority workers and a 29% minority membership goal. In a 5-4 decision including five separate opinions by the justices, the Supreme Court upheld the lower court's order.[7]

As in the *Wygant* case, the multiple opinions in the New York case mean that there is no single controlling rationale for the decision. Four justices (Brennan, Marshall, Stevens, and Blackmun) explained that the lower court order was

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[1] 476 U.S. 267, 106 S. Ct. 1842 (1986).

[2] Specifically, three separate opinions were written by the five justices who voted to invalidate the lay-off plan in *Wygant*: a plurality opinion by Justices Powell, Burger, and Rehnquist, which Justice O'Connor joined in part; a concurring opinion by Justice O'Connor; and a concurring opinion by Justice White. Justices Marshall, Brennan and Blackmun joined in a dissenting opinion, and Justice Stevens dissented in a separate opinion.

[3] 106 S. Ct. at 1852, 1857 (O'Connor, J. concurring); 1857-8 (White, J. concurring).

[4] *Id.* at 1847-49, 1854 (O'Connor, J. concurring).

[5] *Id.* at 1849, 1854 (O'Connor, J. concurring).

[6] 478 U.S. 421, 106 S. Ct. 3019 (1986).

[7] Specifically, two opinions were written by the five justices who voted to uphold the New York court's affirmative action plan. One opinion was written by Justice Brennan and joined by Justice Marshall, Blackmun, and Stevens. A separate opinion was written by Justice Powell, who also joined in the parts of Justice Brennan's opinion which approved the lower court's decision finding that the union was liable and ordering civil contempt sanctions against the union and the appointment of an administrator to supervise compliance with the court's order. Justice O'Connor also agreed with several of these parts of Justice Brennan's opinion, but wrote a separate concurring and dissenting opinion in which she disagreed that the affirmative action provisions of the lower court's order were valid. Justice White wrote a dissenting opinion, and Justices Rehnquist and Burger joined in a separate dissenting opinion.

permissible because it was necessary to remedy pervasive and egregious discrimination and combat the lingering effects of past discrimination, because the affirmative action plan was flexible, temporary, and not being used "simply to achieve and maintain racial balance," because it did not significantly harm nonminority employees, and because it was narrowly tailored to furthering the government's compelling interest in remedying past discrimination.[8] Justice Powell applied a somewhat different rationale, emphasizing that no other effective remedy appeared to be available, that the burden on nonminorities was slight, and that the goal was temporary, directly related to the percentage of minorities in the work force, and not rigidly enforced.[9] All five of the justices in the majority, along with Justice White, specifically rejected the argument advanced by the union and the Justice Department that courts cannot ever order affirmative action remedies which benefit minorities who were not themselves actual victims of discrimination.

The third case decided by the Court in 1986, *Local Number 93, International Association of Firefighters v. City of Cleveland*,[10] involved a challenge by the local firefighters' union to a consent decree agreed upon by the City of Cleveland and a group of minority firefighters. A lower federal court approved and entered the consent decree, which contained promotion goals for minorities and other affirmative action provisions, as the settlement of a job discrimination suit brought by the minority firefighters against the city. The legal issue decided by the Supreme Court was a narrow one: should the validity of the consent decree be judged by the same standards as an order issued by a court over the objections of an employer, as in the New York case, or should it be treated more like a voluntary affirmative action plan, as in the *Wygant* case?

By a 6-3 margin, the Court ruled in the Cleveland case that a consent decree should be treated like a voluntary affirmative action plan, and rejected the union's argument that the decree should be treated like a mandatory court order and that the union had the right to block it.[11] All six justices in the majority (Brennan, Marshall, Blackmun, Stevens, Powell, and O'Connor) agreed that the result was important to help promote Congress' objective of encouraging settlement of discrimination claims and voluntary compliance with anti-discrimination laws.[12] The Court left open the question of whether the Cleveland plan was permissible as a voluntary affirmative action plan.[13]

The Supreme Court's Affirmative Action Decisions in 1987 and 1988

In 1987 and 1988, the Court issued three more affirmative action decisions. The first ruling, *United States v. Paradise*,[14] concerned an affirmative action plan

[8] 106 S. Ct. at 3050-53.

[9] *Id.* at 3054-56.

[10] 478 U.S. 501, 106 S. Ct. 3063 (1986).

[11] *Id.* at 3079-80.

[12] *Id.* at 3072-77.

[13] *Id.* at 3073, 3080 (O'Connor, J. concurring).

[14] 480 U.S. 149, 107 S. Ct. 1053 (1987).

ordered by a federal court in Alabama to remedy discrimination in promotion decisions against black Alabama State troopers. In a 5-4 decision, the Court in *Paradise* upheld the lower court order requiring the Alabama Department of Public Safety to promote one black state trooper for every white trooper promoted to corporal until either 25% of the job category was black or until an acceptable alternative promotion plan was put into place. Although the Court was again unable to reach a consensus on the "appropriate constitutional analysis" to be employed, the majority ruled that the Alabama decree was appropriate even under "strict scrutiny" equal protection analysis because it was "narrowly tailored" to serve the "compelling governmental purpose" of remedying egregious racial discrimination.[15] In sustaining the lower court's decree, the Court pointed to such factors as the inadequacy of proposed alternative remedies, the flexible and temporary nature of the one-for-one requirement, and the fact that it imposed a relatively diffuse burden on white employees.[16]

On March 25, 1987, the Supreme Court issued its decision in *Johnson v. Transportation Agency*.[17] The decision in *Johnson* concerned an affirmative action promotion and hiring plan voluntarily adopted in 1978 by the Santa Clara County Transportation Agency. The plan was intended to achieve a "stastically measurable" yearly improvement in hiring and promoting minorities and women in job categories where they were underrepresented, with a long-term goal of attaining a work force whose composition generally reflected the proportion of women and minorities in the area labor force.[18] The plan directed the agency to establish and adjust specific short-term goals for particular job categories each year, but the plan did not call for quotas or for setting aside particular numbers of positions for minorities or women. In making promotions to positions within job categories where women and minorities were traditionally and significantly underrepresented, the plan authorized the agency to consider as one factor the sex or minority status of qualified applicants for promotion.

In 1979, the agency announced a vacancy for the position of road dispatcher, which is included in the Skilled Craft Worker job category. None of the 238 positions in that category was or ever had been held by a woman. The agency promoted a female applicant, although she was rated slightly less well qualified for the job than a male applicant, Paul Johnson. In 1981, Johnson sued the agency in federal court under Title VII of the Civil Rights Act of 1964, the federal law which bans job discrimination. The trial court found in Johnson's favor and ruled that the agency's affirmative action plan was invalid. The federal court of appeals reversed the lower court decision, however, holding that the plan was proper under Title VII.

In a 6-3 decision, the Supreme Court affirmed the appellate court and upheld the agency's affirmative action plan. In an opinion written for five of the six justices in the majority, Justice Brennan pointed out that Johnson had sued only

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[15] *Id.* at 1066.

[16] *Id.* at 1067-74.

[17] 480 U.S. 616, 107 S. Ct. 1442 (1987).

[18] *Id.* at 1447.

under Title VII, and had not claimed that the plan was unconstitutional.[19] This was one factor which made the *Johnson* case different from the Court's decision in *Wygant*. The Court explained that the plan in *Johnson* should be evaluated using the same criteria employed by the court in *United Steelworkers of America v. Weber*;[20] a decision which upheld a private employer's affirmative action hiring plan under Title VII. The Court held that the Santa Clara plan met the *Weber* standard because it was designed to eliminate a "manifest imbalance" of women in a "traditionally segregated job category," and because it did not "unnecessarily trammel" the rights of male employees.[21]

Justice O'Connor wrote a separate opinion stating that the *Weber* Title VII standard and the *Wygant* constitutional standard are the same, and that the Santa Clara plan met that standard.[22] Justices Scalia, White, and Chief Justice Rehnquist dissented, arguing that the Santa Clara plan was improper under both Title VII and the Constitution.[23]

The Supreme Court's most recent affirmative action decision was issued during January, 1988. *Marino v. Ortiz*[24] involved a challenge by white police officers in New York to a consent decree in a job discrimination suit which provided for additional promotions of minority police officers. The white officers were not formally parties to the suit, but protested the consent decree at a settlement hearing and then appealed the district court order approving the decree. In addition, the white officers filed a new suit challenging the consent decree, which was dismissed by the district court as an impermissible collateral attack on the decree. The court of appeals agreed and affirmed the order dismissing the new suit. The appellate court also dismissed the officers' appeal of the order approving the consent decree, ruling that they did not have standing to appeal the consent decree because they were not formally parties to the underlying case and did not move to intervene.[25]

In a *per curiam* opinion, the Supreme Court affirmed the court of appeals' rulings on procedural grounds and did not reach the merits of the white officers' challenge to the affirmative action plan. The Court agreed that the officers did not have standing to appeal the consent decree because they were not parties to the case and did not seek to intervene for purposes of appeal.[26] As to the issue of whether the white officers' new suit was an impermissible collateral attack on the consent decree, the court split 4-4.[27] Under Supreme Court rules, therefore, the decision to dismiss the new suit was affirmed by an equally divided Court.

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[19] *Id.* at 1449.

[20] 443 U.S. 193 (1979).

[21] *Johnson*, 107 S. Ct. at 1450-56.

[22] *Id.* at 1461-65.

[23] *Id.* at 1469-71.

[24] 108 S. Ct. 586 (1988).

[25] Marino v. Ortiz, 806 F.2d 1144, 1147 (2d Cir. 1986).

[26] *Marino*, 108 S. Ct. at 587.

[27] *Id.*

The 4-4 split in *Marino* illustrates that issues concerning affirmative action continue to divide the justices.

AFFIRMATIVE ACTION DECISIONS IN THE LOWER COURTS AFTER *WYGANT*

Since the Supreme Court's decision in *Wygant*, a number of lower courts have decided cases concerning the validity of affirmative action plans. These cases have dealt with affirmative action in hiring, in promotions, and in layoff decisions.

Unfortunately, however, these lower court decisions also have failed to provide uniform guidance as to what types, and under what circumstances, affirmative action plans are permissible. Some courts have upheld affirmative action plans, while other courts have invalidated such plans. While all the courts have agreed that the burden of proof is on the party who challenges an affirmative action plan, and while all courts have scrutinized carefully the objectives of affirmative action programs and the methods chosen to achieve those objectives, the courts' decisions have varied considerably depending upon the circumstances of individual cases.

The remainder of this section will discuss specifically many of the decisions of the lower federal courts concerning affirmative action since the Supreme Court's decision in *Wygant*. The discussion of these lower court decisions upholding and invalidating affirmative action plans is separated into three areas: hiring, promotion, and layoffs. An important decision concerning affirmative action in student admissions decisions is reviewed specifically as well.

Affirmative Action in Hiring

Affirmative action hiring plans have met with mixed success after *Wygant*. One such plan was recently upheld, but courts have invalidated several affirmative action hiring plans because of insufficient evidence of past discrimination or because of inadequate safeguards to protect employees who did not benefit from the affirmative action plan. In addition, a court ruled in one case that an employer's failure to follow an affirmative action plan could be used against the employer in a job discrimination suit by a prospective minority employee.

In *United States v. New York*,[28] two white males claiming reverse discrimination tried to upset an affirmative action hiring plan seven years after it had been ordered by the district court as a remedy for discrimination. The court had ordered that New York seek to ensure that approximately 40% of newly hired state troopers be minorities until the overall minority percentage of state troopers reflected the percentage of minorities in the relevant labor market. The court rejected the challenge and upheld the plan, based primarily on the fact that the challenge was raised seven years after the plan was ordered.[29] In addition, the court relied upon language in *Wygant* and several other Supreme Court cases

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[28] 112 F.R.D. 165 (N.D.N.Y. 1986).

[29] *Id.* at 167-68.

which indicated that affirmative action hiring plans are valid under some circumstances.[30]

In *Hammon v. Barry*,[31] the court invalidated an affirmative action hiring plan for the D.C. police department adopted as part of a consent decree. The court ruled that there was virtually no evidence of past or current discrimination in the department to justify affirmative action. In addition, the court explained, the department had failed to consider seriously any "non-race-based alternatives" that could have enabled it to achieve its long-range goals.[32] The court later denied a petition for rehearing based on the Supreme Court's decision in *Johnson*, ruling that there was no "manifest imbalance" in any "traditionally segregated job category" which could justify the D.C. affirmative action plan.[33]

In another case, *Lilly v. City of Beckley*,[34] the court invalidated an informal affirmative action hiring plan under which the city generally gave preference to minority applicants. The court held that such an informal plan, without any specific time limitations, numerical goals, or other features, lacked the safeguards necessary to be sure that the plan did not unnecessarily harm non-minorities.[35] In addition, the court explained, the plan was invalid because the city did not show that it was related to the remedial purpose of hiring qualified minority applicants.[36]

In addition, a district court decision approving a police and fire department affirmative action hiring plan was reversed in *Janowiak v. City of South Bend*.[37] In *Janowiak* the district court had granted summary judgment against a white applicant's challenge to a voluntary plan under which separate lists were kept for minority and white applicants, and some minority applicants with lower test scores than whites received jobs, based on disparities between the percentage of minorities in the city as a whole and the percentage in the police and fire departments. The court of appeals had previously reversed the district court's decision,[38] but the Supreme Court remanded for further consideration in light of *Wygant* and *Johnson*.

On remand, the court of appeals essentially adhered to its earlier decision and reversed the district court. The appellate court ruled that both under Title VII and the Constitution, the justification for the city's plan was insufficient because it focused on general population statistics, rather than comparing the city's work force to the "relevant qualified area labor pool."[39] The court also noted that there was no evidence of prior discrimination by the city in the record.

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[30] *Id.* at 169-69.

[31] 813 F2d 412 (D.C. Cir. 1987).

[32] *Id.* at 432.

[33] Hammon v. Barry, 826 F2d 73, 78 (D.C. Cir. 1987).

[34] 797 F2d 191 (4th Cir. 1986).

[35] *Id.* at 195-96.

[36] *Id.*

[37] 836 F2d 1034 (7th Cir. 1987).

[38] 750 F2d 557 (7th Cir. 1984), *vacated and remanded*, 107 S. Ct. 1620 (1987).

[39] 836 F2d at 1041-42.

In another hiring case, *Andrews v. City of Johnstown,*[40] the plaintiff alleged racial discrimination because the city failed to advertise or inform him of an available position. As part of his evidence of discriminatory intent by the city, the plaintiff proved that the city failed to follow its affirmative action plan in hiring for the position in question, which called for job opportunities to be publicized in a way which would have informed him of the opening. The court ruled in favor of the plaintiff, relying heavily on the city's failure to follow its affirmative action plan.[41]

One other recent case concerned an affirmative action hiring plan. In *Neely v. City of Grenada,*[42] a federal district court had previously ordered an affirmative action hiring plan as a remedy against a city which had been found guilty of job discrimination. Several years later, the plaintiffs claimed that the city had failed to follow the plan. The court disagreed, and ruled that the city had met the court-ordered hiring goals and that its jurisdiction over the case should be ended.[43]

Affirmative Action and Promotions

Several lower court decisions since *Wygant* have upheld affirmative action promotion plans, although significant questions remain unresolved about such plans. *Ledoux v. District of Columbia,*[44] concerned a D.C. police department affirmative action plan under which minority status and sex were considered as factors in choosing among qualified employees, with the long-term goal of achieving racial and sexual balance in higher level positions in the department. The court of appeals ruled that the plan was valid under Title VII, the federal law prohibiting job discrimination, because it met the standards established by the Supreme Court in *Johnson.* The *Ledoux* court explained that in *Johnson,* the Supreme Court upheld a voluntary affirmative action promotion plan under Title VII because of evidence of a "manifest imbalance" in "traditionally segregated job categories," and because the plan did not "unnecessarily trammel" the interests of non-minority employees. In *Ledoux,* the court explained, there was unchallenged statistical evidence of a "manifest racial and sexual imbalance" in higher level police department positions.[45] In addition, the court ruled that the D.C. plan did not "unnecessarily trammel" the interests of non-minority employees because it did not displace any such employees or prevent them from being promoted, and did no more than temporarily authorize consideration of race or sex as one factor in promotion decisions.[46]

The court in *Ledoux* recognized, however, that it is not enough for an affirmative action plan by a public employer to comply with Title VII. Such a plan must also be valid under the equal protection clause of the fourteenth amend-

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[40] 669 F Supp. 127 (W.D. Pa. 1987).

[41] *Id.* at 129-30.

[42] 799 F2d 203 (5th Cir. 1986).

[43] *Id.* at 212.

[44] 820 F2d 1293 (D.C. Cir. 1987).

[45] *Id.* at 1304.

[46] *Id.* at 1305.

ment of the Constitution, which was the issue before the Supreme Court in *Wygant*. The *Ledoux* court explained that based upon *Wygant*, there must be a "strong basis in evidence" to establish that affirmative action is necessary to remedy past discrimination or accomplish some other valid purpose.[47]

Unfortunately, neither the Supreme Court nor any other court has defined what is meant by a "strong basis." The court in *Ledoux* suggested that this standard requires more than a "manifest imbalance," but less than what would be required to prove a *prima facie* case of job discrimination.[48] The court also indicated that strong statistical evidence of disparities or evidence of actual past job discrimination could be sufficient to meet the test.[49] Because the record in *Ledoux* was unclear, the court of appeals sent the case back to a lower court to determine whether the D.C. plan met constitutional standards.

Another affirmative action promotion plan was upheld in *Youngblood v. Dalzell*.[50] In that case, a job discrimination suit against the Cincinnati fire department ended in a consent decree which set a goal of an 18% black work force by 1980, and which required affirmative action in promotions in order to achieve a "work force composition which negates any inference" of discrimination.[51] When the 18% goal was not achieved, the federal district court issued a compliance order which required that an additional qualified black candidate be promoted to the position of lieutenant for every six regular promotions to that position. The firefighters' union challenged the court's compliance order and the consent decree. The court in *Youngblood* rejected the union's challenge, explaining that the plan and the order did not "unnecessarily trammel" the interests of white employees since they did not displace or damage the seniority rights of such employees and were temporary and flexible.[52] The court also ruled that the plan and the order were valid efforts to "break down the patterns of racial segregation that gave rise to the consent decree."[53]

Another voluntary affirmative action promotion plan for a city fire department was upheld in *Smith v. Harvey*.[54] The plan in *Smith* called for the St. Petersburg fire department to give slightly less than half the promotions in job categories where minorities or women were significantly underrepresented to qualified female or minority candidates. The court ruled that affirmative action was justified by evidence of a significant statistical disparity between the minority and female composition of such job categories and the relevant labor market, as well as by administrative and judicial findings of discrimination against other city agencies.[55] In addition, the court explained, the plan did not "unnecessarily trammel" the

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[47] *Id.*

[48] *Id.* at 1305-06.

[49] *Id.* at 1303-04.

[50] 804 F.2d 360 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1576 (1987).

[51] 804 F.2d at 361.

[52] *Id.* at 365.

[53] *Id.*

[54] 648 F. Supp. 1103 (M.D. Fla. 1986).

[55] *Id.* at 1110-12.

interests of white males because it did not displace any such employees or absolutely bar their advancement, and because no less restrictive means of accomplishing the city's goal was suggested.[56]

A similar result was reached in *Higgins v. City of Vallejo*.[57] In *Higgins*, the city had adopted by resolution an affirmative action plan which called for increased hiring and promotion of minorities and women. The plan was challenged by a white applicant for promotion in the city fire department who ranked first on the promotion test but did not receive the job. The district court granted summary judgment against the applicant, and the court of appeals affirmed.

The court of appeals ruled that the city's promotion plan was valid under Title VII because there was a "manifest imbalance" between the racial composition of the city work force and the city and because the plan did not "unnecessarily trammel" the interests of white employees.[58] This was because the plan did not contain quotas, provided only that minority status would be considered as a positive factor, did not disrupt settled expectations or entitlements of white employees, and was temporary since it sought to attain but not maintain a more racially balanced work force.[59] The court held that the plan complied with the Constitution because the city had a "compelling interest" in remedying past discrimination as suggested by a state administrative report on the city's employment practices, and because the plan was "narrowly tailored" to achieve racial balance for reasons similar to those that suggested the plan did not "unnecessarily trammel" the interests of white employees.[60] Significantly, the court noted that an affirmative action promotion plan such as Vallejo's was even "less intrusive" than a plan involving hiring goals, since it did not totally deny a job to white applicants and called for them to "retain their existing jobs, salary, and seniority."[61]

A public utility's voluntary affirmative action promotion plan was upheld in *Jones v. Memphis Light, Gas & Water Division*.[62] That case involved "priority posting" provisions which called for qualified minority and female applicants to be preferred in promotions and in hiring in departments where a significant underrepresentation of women and minorities existed. The court ruled that there was a "firm basis" for employing affirmative action, based on documents indicating past discrimination and based on statistical evidence of significant disparities between the percentage of women and minorities in the public utility's work force as compared with the overall labor market.[63] The court also held that the plan did not "unnecessarily trammel" the interests of white male employees because they continued to receive most available promotions, because no discharges were required, because the plan applied to less than half of all promo-

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[56] *Id.* at 1113.

[57] 823 F.2d 351 (9th Cir. 1987).

[58] *Id.* at 356-57.

[59] *Id.* at 357-58.

[60] *Id.* at 358-60.

[61] *Id.* at 360.

[62] 642 F. Supp. 644 (W.D. Tenn. 1986).

[63] *Id.* at 658.

tions, and because constructive seniority was awarded to any employee temporarily passed over for advancement.[64]

An unusual challenge to a voluntary affirmative action promotion plan was rejected in *Barcume v. City of Flint*.[65] In that case, several female employees claimed that a promotion plan for the city's fire and police departments was improper because it only covered racial minorities and included no affirmative action to benefit women. The court rejected the challenge, explaining that an affirmative action plan need not include all groups which may have suffered discrimination, and that the city could concentrate on one such problem at a time.[66]

Finally, several courts have issued recent decisions concerning the implementation of affirmative action promotion plans. In *Parker v. Baltimore and Ohio Railroad Co.*[67] an unsuccessful white male applicant for a promotion claimed that his employer had violated his rights by waiving testing requirements which applied to certain positions under the company's affirmative action plan. The court rejected the challenge, explaining that there were reasonable nondiscriminatory reasons for the waivers and that most such waivers had benefited white male employees.[68]

A different result was reached in *Maryland National Capital Park and Planning Commission v. Crawford*.[69] In that case, the affirmative action plan provided for an exception to minority employment goals where a non-minority was evaluated as "clearly superior." A white employee claimed that she had received this rating, but had nevertheless been denied a transfer. The court agreed with the claim, and ordered that the white employee receive the position for which she had applied, as well as damages and attorneys' fees.

A different type of promotion decision was issued in *Richards v. New York City Board of Education*.[70] In *Richards*, a black carpenter employed by the board challenged a decision to deny his promotion to foreman. The court ruled in the plaintiff's favor, finding intent to discriminate by the board. As in the *Andrews* case concerning hiring discussed above, an important factor in the court's decision was the board's failure to follow its own affirmative action plan which called for the increased promotion of minority applicants.[71]

Affirmative Action and Layoffs and Discharges

Lower court decisions concerning layoff protection for minority and female workers hired under affirmative action plans have produced mixed results. No court has specifically upheld such a plan, and one court invalidated an affirmative

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[64] *Id.* at 662.

[65] 638 F. Supp. 1230 (E.D. Mich. 1986).

[66] *Id.* at 1234.

[67] 641 F. Supp. 1227 (D.D.C. 1986).

[68] *Id.* at 1234-35.

[69] 511 A.2d 1079 (Md. 1986).

[70] 668 F. Supp. 259 (S.D.N.Y. 1987).

[71] *Id.* at 266.

action layoff plan adopted by a school board. On the other hand, the courts have suggested that such layoff protection may be permitted, and may even be required, under some circumstances. As with respect to hiring and promotion, one court has ruled that the failure to follow an affirmative action plan may be used against the employer in a discharge case.

In *Britton v. South Bend Community School Corp.*,[72] a court of appeals invalidated an affirmative action layoff plan adopted by the South Bend, Indiana school district. The plan, which had been adopted as part of a contract with a teachers' union in order to prevent layoffs of recently hired minority workers, provided that no minority employees would be laid off during the three-year duration of the contract. The court ruled that even if there was a sufficient justification for affirmative action in South Bend, the layoff plan was too detrimental to the interests of white employees, since it effectively provided that all white teachers would have to be laid off before even a single black teacher could be laid off.[73] The court did note, however, that affirmative action layoff plans could be valid under some circumstances. Several of the judges in *Britton* also commented that rationales such as promoting racial diversity in school faculty can help justify affirmative action.[74]

In contrast to *Britton*, another court suggested that an employer may be *required* to give some kind of layoff protection to minority employees hired as a result of affirmative action. In *Fang-Hui Liao v. Dean*,[75] an employer laid off a minority worker who had been hired under an affirmative action plan, instead of laying off a white male employee with equal qualifications and less seniority. The court ruled that the layoff violated the minority employee's rights, and ordered that she be reinstated and receive back pay.[76] The court's decision was influenced largely by the fact that the minority employee had more seniority than the white employee who retained his job. In addition, the court suggested that the employer had "undertaken an affirmative action obligation" to its minority employees, and that it must at least give "the benefit of the doubt" to such employees during layoffs.[77]

A very different result was reached in *NAACP v. Detroit Police Officers Association*.[78] In that case, a lower court had forbidden the Detroit Police Department from laying off any officers who had been hired under its affirmative action plan. The court of appeals reversed the decision, and ruled that the police department could lay off officers who had been recently hired under the plan. This result was necessary, the court explained, because otherwise employers might refuse to adopt affirmative action in the first place "so as not to compromise their flexibility in the future when reductions in force become necessary."[79]

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[72] 819 F.2d 766 (7th Cir. 1987).

[73] *Id.* at 772.

[74] *Id.* at 773.

[75] 658 F. Supp. 1554 (N.D. Ala. 1987).

[76] *Id.* at 1561.

[77] *Id.*

[78] 821 F.2d 328 (6th Cir. 1987).

[79] *Id.* at 331.

The same court which decided the *Detroit Police Officers* case sidestepped the issue of the validity of affirmative action layoff plans in two other cases. In *Berry v. School District of Benton Harbor*,[80] the issue was the validity of a lower court order which prohibited the layoff of black teachers who had been hired as part of a court-approved affirmative action plan. The court of appeals vacated the order as moot when it became clear that layoffs would not take place, commenting that "knowledge of the particular facts surrounding a layoff are crucial to a fair and equitable remedy."[81] In another case, *Long v. City of Saginaw*,[82] the court sent back to the lower court a decision approving a layoff-related plan, suggesting that the lower court consider the Supreme Court's decision in *Wygant* before rendering its decision.

Finally, in *Morman v. John Hancock Mutual Life Insurance Co.*,[83] a court ruled that in discharge cases, as in hiring and promotion cases, a minority employee may use against an employer the failure to follow an affirmative action plan. In *Morman*, a black employee challenged his discharge, claiming that race was a factor in his termination. The jury found for the plaintiff, who had introduced evidence that the employer failed to follow its voluntary affirmative action plan and did not re-examine the plaintiff's removal. The defendant claimed it was prejudicial error to permit the introduction of the evidence concerning the affirmative action plan. The court rejected the defendant's motion and ruled that failure to follow an affirmative action plan was admissible so long as there is a "significant connection" between the failure to follow the plan and the alleged mistreatment of the plaintiff.[84]

Affirmative Action and Student Admissions Decisions

Several months after *Wygant*, the court in *Geier v. Alexander*[85] upheld the use of affirmative action in seeking to remedy discrimination in student admissions decisions. In *Geier*, the court had previously found that the State of Tennessee had discriminated against blacks in admissions to state colleges and universities and had maintained a segregated higher education system. As part of the remedy, all the parties to the case except for the federal government agreed to a five-year plan under which 75 black sophomore students per year would be pre-enrolled in state professional schools, receive counselling and other assistance, and then be enrolled as graduate students if they finished college and met minimum admissions requirements.

Despite the Justice Department's objections, the court of appeals upheld the plan. The past history of discrimination by the state, the court explained, amply justified the use of affirmative action.[86] In addition, the court ruled, the plan was

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[80] 801 F2d 872 (6th Cir. 1986).

[81] *Id.* at 874.

[82] No. 85-1352 (6th Cir. Oct. 20, 1986).

[83] 672 F Supp. 993 (E.D. Mich. 1987).

[84] *Id.* at 996-97.

[85] 801 F2d 799 (6th Cir. 1986).

[86] *Id.* at 805.

"narrowly tailored" to meet its objectives because it was temporary, did not displace specific white enrollees, required pre-selected students to meet academic standards, and was ordered only after "sixteen years of alternative efforts failed to remove the vestiges of *de jure* segregation."[87] The court specifically rejected the Justice Department's claim that the plan was improper because it benefited minorities who were not themselves the victims of illegal discrimination by the state.[88]

KEY QUESTIONS CONCERNING THE SUPREME COURT'S AFFIRMATIVE ACTION DECISIONS

The multiple opinions in the affirmative action cases make it unclear precisely what impact the decisions will have in future cases. Analysis of the conflicting opinions, however, raises the following important questions and suggested answers for school boards and administrators:

1) Can a court order a school board or other employer which is found guilty of job discrimination to adopt an affirmative action plan?

Yes. Although the standards for approving such orders are not definite, such orders are permissible at least in cases of egregious discrimination, where lesser remedies are not likely to be successful, and where the affirmative action provisions are temporary, flexible, directly related to the percentage of minorities in the relevant labor market, and do not significantly burden non-minority employees.

2) Can a school board or other employer settle a job discrimination suit by agreeing to affirmative action provisions as part of a settlement agreement included in a court-enforced consent decree?

Yes, as the *Local 93*[89] case makes clear. The *Local 93* decision also suggested that an employer could voluntarily agree to affirmative action even in cases where a court could not order such a remedy. It is possible, however, that non-minorities could seek to prevent or upset a consent decree by arguing that the affirmative action plan discriminates against them. Such a challenge would be evaluated under essentially the same legal standards as a challenge to a purely voluntary plan.

3) Can a school board or other employer decide voluntarily to adopt an affirmative action employment plan?

Yes, in some instances. The Court had previously upheld voluntary affirmative action by private employers several years ago in the *Weber*[90] decision. In *Wygant*[91] virtually all the justices agreed that some form of voluntary affirmative action by

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[87] *Id.* at 805-06.

[88] *Id.* at 804.

[89] 478 U.S. 501, 106 S. Ct. 3063 (1986).

[90] 443 U.S. 193 (1979).

[91] 476 U.S. 267, 106 S. Ct. 1842 (1986).

public employers is permissible in some circumstances as well and that, as Justice O'Connor explained, such plans "need not be limited to the remedying of specific instances of identified discrimination."[92] Even the plurality opinion of Justice Powell in *Wygant* reaffirmed the principle that "it may be necessary to take race into account" in remedying prior discrimination, and that persons not responsible for any past discrimination "may be called upon to bear some of the burden of the remedy."[93] Six justices thus agreed in the *Local 93* case that "there may be instances in which a public employer . . . could voluntarily agree to take race-conscious measures in pursuance of a legitimate remedial purpose."[94] And in *Johnson*, the Supreme Court specifically approved an affirmative action plan by a public employer under Title VII.

4) Must a school board admit that it has discriminated in the past in order to adopt an affirmative action program?

No. The Court suggested in *Wygant* that no such admission is necessary, and made the point clear in *Johnson*.[95] This rule applies to private colleges and other private employers as well as to school boards and other public employers.

5) Can affirmative action be justified by a disparity between the percentage of women or minorities working for an employer and the percentage in the relevant labor market?

Yes, at least for a private employer. In such a case, according to *Johnson*, it is sufficient if there is a "manifest imbalance" between the percentage of minorities or women in an employer's work force and the percentage in the relevant labor market in "traditionally segregated job categories."[96] If a job requires special training, the comparison should be with those in the relevant labor force who possess the required qualifications. Although the Court did not define "manifest imbalance," it is clearly less than the disparity necessary to make out a "prima facie" case of job discrimination by the employer. A job category is "traditionally segregated" if opportunities for and actual employment of women or minorities have been limited, even without proof of discrimination by any specific employer.

6) Does the rule announced in *Johnson* govern affirmative action by a school system?

No. The *Johnson* case only concerns the validity of affirmative action under Title VII, since Johnson decided to sue Santa Clara County only under Title VII. Unlike private employers, public employers like school boards are subject to constitutional anti-discrimination requirements as well as Title VII, and should design their affirmative actions plans to meet both constitutional and Title VII standards. While the majority in *Johnson* stated that the Constitution's require-

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[92] 106 S. Ct. at 1853 (O'Connor, J. concurring).

[93] *Id.* at 1850.

[94] 106 S. Ct. at 3073 n.8.

[95] 480 U.S. 616, 107 S. Ct. 1442 (1987).

[96] 107 S. Ct. at 1450-56.

ments are stricter than Title VII's, it is not clear what these constitutional requirements are and how they will be applied. This is because a majority of the Supreme Court in the *Wygant* case could not agree on the proper constitutional standard. It appears that a majority of the Court would require a "firm basis" for the public employer to believe that remedial action was required to address that employer's past discrimination. Such a "firm basis" could be supplied by the kind of evidence presented in *Johnson*. A statistical disparity between the percentage of women or minorities in a public employer's work force and the relevant labor market is probably sufficient to justify some type of affirmative action if it would be large enough to support a job discrimination claim against the employer. In a challenge to an affirmative action plan, the Court has explained, the party challenging the plan bears the burden of proof.

7) May voluntary affirmative action employment plans be justified solely by past "societal" discrimination or to introduce more minority "role models"?

Probably not. In evaluating any particular affirmative action plan, a court will consider both the importance of the objectives which the plan seeks to serve and the extent to which the plan is tailored specifically to achieve those objectives. But a court will apparently not accept the goals of remedying general societal discrimination and providing role models for minorities as sufficiently important goals to warrant affirmative action.

8) Can past discrimination by a school board or other employer warrant voluntary affirmative action by that employer?

Yes. Attempting to compensate for the effects of past discrimination by the employer adopting an affirmative action program is clearly a sufficiently important objective. Moreover, an explicit court or other finding of discrimination is not necessary prior to adopting a voluntary plan. It is unclear, however, precisely what type of evidence *is* required. Statistical evidence of a disparity between the percentage of minorities in the employer's work force and the percentage in the relevant labor market is pertinent and may alone be sufficient to justify affirmative action. But other types of disparities, such as disparity between the percentage of minority faculty and minority students in a school district, will not help defend affirmative action.

9) Can promotion of racial diversity in a work force justify voluntary affirmative action?

Depending upon the circumstances, promoting racial diversity may also be a sufficiently important goal to help justify some affirmative action employment programs, particularly for educational institutions like school districts and universities. It is not clear, however, whether that purpose is sufficient standing alone.

10) What types of affirmative action are acceptable?

The kind of affirmative action programs considered appropriate will clearly depend upon individual circumstances. It is also possible that stricter standards

will be applied to affirmative action by school boards and other public employers than to private employers, although the Court has not specifically addressed this question. It will be very difficult to justify a plan relying upon layoffs or other measures that, as Justice Powell explained in *Wygant*, "impose the entire burden of achieving racial equality on particular individuals" and disrupt "settled expectations" of existing employees.[97] It appears that layoffs may be used, if at all, only where less stringent methods would not achieve the employer's legitimate goals. Measures which tend to "impose a diffuse burden" on a larger number of individuals, such as hiring goals or affirmative recruitment plans, are much more likely to be acceptable.[98] The courts are most likely to accept plans which are flexible and simply include minority or female status as a positive factor in job decisions, as in *Johnson*. As Justice Powell specifically warned in the *Local 28* case, however, even hiring goals may be impermissible under some circumstances. Some courts have suggested that affirmative action promotion plans as in *Johnson* may be considered more acceptable than affirmative action hiring goals, since promotion plans do not totally deny jobs to white applicants and usually call for applicants who are not promoted to retain their existing jobs, salaries, and seniority.

11) Can numerical goals be used in affirmative action plans?

Yes, if they are designed and implemented properly. It is important that the right labor market comparison be used in selecting goals. For example, a school system could choose a percentage goal for hiring minorities for unskilled positions comparable to the percentage of minorities in the general labor market. On the other hand, the right kind of comparison for a school board affirmative action plan for minority teachers would be the percentage of qualified minority teachers in the labor market. Goals are also more likely to be acceptable where they are flexible and temporary and consider factors such as likely turnover and new job openings. Rigid quotas will probably be disapproved, although it may be permissible under some circumstances to set aside temporarily a carefully specified number of job positions for women or minorities as part of an affirmative action plan. The decision in *Johnson* indicates that the types of goals suggested in Executive Order 11246, which applies to government contractors, would probably be considered valid under most circumstances, although lower courts have recently overturned minority "set-aside" provisions in Michigan and Virginia which required that minority-owned companies receive specified percentages of government contract awards.

12) Do the same rules apply to affirmative action plans based on sex and on race?

Yes, for private employers. For public employers like school boards, this question remains unclear because the Supreme Court has not yet considered a constitutional challenge to an affirmative action plan for women. Other Court

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[97] 106 S. Ct. at 1851-52.

[98] *Id.*

decisions have applied a less strict standard under the Constitution to charges of sex discrimination than to claims of race discrimination. This suggests that it may be easier to uphold affirmative action based on sex rather than on race under the Constitution.

CONCLUSION

In light of the divisions that appear to remain in the Supreme Court and in the lower courts, school boards and administrators should carefully evaluate their employment practices, especially in the area of affirmative action. It is clear that the courts will continue to consider issues relating to affirmative action, and that school boards will need to continue to adjust their policies and conduct to the evolving judicial climate in this area. School boards which have adopted or are considering affirmative action plans should scrutinize closely the specific objectives served and methods employed by such plans in terms of the general criteria suggested above, and should consult closely with legal counsel in deciding whether and how to adopt, implement, or change affirmative action plans.

Communicable Diseases and Students: Legal Issues and Policy Considerations

By: Arthur W. Cernosia

INTRODUCTION

In addressing the issue of students with communicable diseases, school officials are faced with the difficult task of balancing the student's right to attend school and to be placed in the least restrictive educational environment with the school's duty to provide a safe environment for all students and employees. This balancing becomes more complex when one adds in parents and community members demanding "guarantees" of safety and an evolving body of scientific and medical information regarding the transmission and treatment of communicable diseases.

This article will examine significant case law in this area and propose policy considerations in dealing with students with communicable diseases. As used throughout this article, a communicable disease is an illness capable of being transmitted through personal contact with others. Virtually all reported judicial decisions have focused on those students who are carriers of or are afflicted with the AIDS virus or Hepatitis B. Although most case law has been restricted to those diseases, schools may have to deal with several other communicable diseases. School districts should refer to their state statutes to determine the definition of communicable diseases which require reporting to public health officials. Such communicable diseases may include, among others, herpes, measles, meningitis, mumps, rubella, syphilis and tuberculosis.

ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS)

As of November 1988 the Centers for Disease Control has reported that over 78,000 Americans have contracted Acquired Immune Deficiency Syndrome (AIDS).[1] AIDS has been reported in every state of the country. A report by the House Select Committee on Children, Youth and Families predicts that the number of children under the age of 13 who have the fatal disease will increase 350% by 1991 to 3,000 or more cases.[2]

Since there are a variety of illnesses associated with AIDS, it is impossible to treat all afflicted children alike. This article will discuss three categories of persons

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[1] Centers for Disease Control, *AIDS Weekly Surveillance Report* (Nov. 14, 1988).

[2] *A Generation In Jeopardy: Children and AIDS*, House Select Committee on Children, Youth and Families (1987).

infected with the AIDS virus: those students with AIDS, those students with AIDS Related Complex (ARC) and those students who are asymptomatic carriers of the virus. Reference will be made generally to AIDS unless a distinction among categories is required.

Categories of AIDS Infection

- **Students with AIDS**

AIDS is the name given to a complex variety of illnesses that may occur in persons infected with the Human Immunodeficiency Virus (HIV). Infection with HIV causes a defect in a person's natural immunity against disease. This defect leaves infected individuals vulnerable to other serious infections and cancers referred to as opportunistic diseases.[3]

In order to be diagnosed as having AIDS, an individual must meet the revised definition of the disease developed by the Centers for Disease Control for reporting purposes.[4] To qualify as an AIDS patient under this definition, a person must have certain severe life threatening opportunistic infections or malignancies coupled with a suppressed immune system for which there is no other known cause.[5] A student who meets this definition of AIDS is in the final stages of a series of health problems caused by the HIV infection.

- **Students with AIDS Related Complex (ARC)**

Cases in this category cover less severe but still serious forms of the HIV infection. Patients with ARC may suffer from weight loss, chronic fatigue, fever and chronic swollen glands. Some ARC patients progress to the severe illness of AIDS, while others do not.

- **Asymptomatic Carriers**

This category describes persons with the HIV infection that causes AIDS but who have no outward symptoms. They are capable of transmitting the virus to others. It is estimated that 1 to 1.5 million people in the United States have been infected with HIV.[6]

Legal Considerations

- **Education for All Handicapped Children Act**

Is a child infected with AIDS considered "handicapped" within the meaning of the Education for All Handicapped Children's Act (EHA)[7] and therefore entitled to an individualized education program (IEP) placing him in the least restrictive

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[3] Department of Health and Human Services, Public Health Services, Centers For Disease Control, *Questions and Answers About Acquired Immunodeficiency Syndrome* (December 1987).

[4] Centers For Disease Control, Morbidity and Mortality Weekly Report Supplement, Volume 36, No. 15, at 3S-15S (August 14, 1987).

[5] *Id.*

[6] *Questions and Answers, supra*, note 3.

[7] 20 U.S.C. §§ 1400-1485.

environment, that is, an environment which allows maximum interaction with non-handicapped peers? The EHA defines "handicapped children" as children who are:

> mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, *or other health impaired children*, or children with specific learning disabilities, *who by reason thereof require special education and related services*." (emphasis added)

The EHA's regulations define "other health impaired children," as children who have:

> limited strength, vitality or alertness due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes *which adversely affects a child's educational performance*." (emphasis added)

In applying these definitions to a six year old hemophiliac who was diagnosed as having AIDS, a federal district court in *Doe v. Belleville Public School District No. 118*,[10] concluded that three tests must be met before the provisions of the EHA would apply to such a case. 1) there must be limited strength, vitality or alertness due to chronic or acute health problems; 2) these problems must adversely affect a child's educational performance; *and* 3) the student must require special education and related services.[11]

The *Doe* court concluded that the EHA would apply to an AIDS victim *only* if the student's physical condition adversely affects educational performance, i.e., the ability to learn and to do the required classroom work.[12]

Similarly, the Supreme Court of the State of New York, County of Queens in *District No. 27 Community School v. Board of Education of the City of New York*,[13] held that while a child with AIDS could become handicapped as defined in the EHA as a result of deterioration in his/her condition, such children are not handicapped for purposes of the EHA merely because they have AIDS, ARC or are infected with the HIV virus.

Likewise, a special education hearing officer from the State of Connecticut in the case *In re: D.B.*,[14] held that a five year old with ARC did not meet the state eligibility criteria for special education as an "other health impaired" student. In upholding the Child Studies Team's finding of ineligibility, the hearing officer found that the student, whose cognitive language and motor skills were all within average range, was not in need of special education.[15]

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[8] 20 U.S.C. § 1401(a)(1).

[9] *See* 34 C.F.R. § 300.5(b)(7).

[10] 672 F.Supp. 342 (S.D. Ill. 1987).

[11] *Id.* at 344.

[12] *Id.* at 345.

[13] 130 Misc. 2d 398, 502 N.Y.S.2d 325 (1986).

[14] 1985-1986 EHLR Dec. 507:303 (SEA Conn. 1985).

[15] *Id.* at 507:308.

On the other hand, in *In re: Ryan W.*[16] a hemophiliac student who contracted AIDS from a blood transfusion was found by a special education hearing officer to be handicapped under the EHA as an "other health impaired" student. The hearing officer found "that the child's handicapping condition is the combination of hemophilia and AIDS" which limits the child's strength, vitality and alertness and therefore meets the eligibility criteria under the EHA.[17]

- **AIDS and the Rehabilitation Act of 1973 (Section 504)**

Courts agree that whether or not a student is entitled to special education under the EHA, the protections of the Rehabilitation Act of 1973 apply.[18] Section 504 of the Rehabilitation Act of 1973 prohibits discrimination in any federally financed program or activity against an otherwise qualified handicapped person solely on the basis of handicap. Under Section 504:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .[19]

The regulations promulgated under Section 504 define a handicapped person as: " any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."[20]

The regulations further define physical or mental impairment as: "any physiological disorder or condition . . . affecting one or more of the following bodily systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine."[21]

The decisions which have addressed the applicability of Section 504 have held that children with AIDS, ARC and asymptomatic carriers of HIV are handicapped within the definition. In *Thomas v. Atascadero Unified School District*,[22] the court held that a five year old kindergarten student infected with the AIDS virus as an infant by means of a blood transfusion is a "handicapped person" within the meaning of Section 504. The court acknowledged that:

> Persons infected with the AIDS virus suffer significant impairments of their major life activities. People infected with the AIDS virus may have difficulty caring for

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[16] 1985-86 EHLR Dec. 507:329 (SEA Ind. 1985).

[17] *Id.* at 507:240.

[18] 29 U.S.C. § 794.

[19] The Civil Rights Restoration Act, Pub. L. No. 100-259, 100 Stat. 28, enacted by Congress in March 1988 reinstates the jurisdiction of Section 504 over all programs and activities of an institution receiving federal funds. The Act overturns the effect of the U.S. Supreme Court's decision, *Grove City College v. Bell*, 465 U.S. 555 (1984).

[20] See 34 C.F.R. § 104.3(j)(1).

[21] 34 C.F.R. § 104.3(j)(2)(i)(A).

[22] 662 F.Supp. 376 (C.D. Calif. 1987).

> themselves, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working, among other life functions. Even those who are asymptomatic have abnormalities in their hemic and reproductive systems making procreation and childbirth dangerous to themselves and others.[23]

Although there was no medical reason the student could not attend a regular classroom, he had frequent pulmonary and middle ear problems as well as chronic lymphadenopathy attributable to his infection with the AIDS virus. Therefore, the protections of Section 504 applied.

Likewise, the court in *District 27 Community School* found that since the AIDS virus destroys lymphocytes, "a person with AIDS clearly has such a 'physical impairment'" within the Section 504 definition.[24] The court noted further that Section 504 covers *those who are regarded as having such an impairment* which the regulations define to mean any person who:

> (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.[25]

The fact that a school might consider excluding a student with AIDS or ARC, or an asymptomatic carrier of HIV would be evidence that the student was being treated as having such an impairment, thus giving further support to the application of Section 504.

- **Placement Issues—Least Restrictive Environment**

Exposure to the AIDS virus comes through intimate sexual contact with the person carrying the virus, through blood or blood products contaminated with the virus or from an infected mother to her infant. The United States Surgeon General has reported that:

> None of the identified cases of AIDS in the United States are known or are suspected to have been transmitted from one child to another in a school, day care, or foster care setting. Transmission would necessitate exposure of open cuts to the blood or other bodily fluids of the infected child, a highly unlikely occurrence. Even then, routine safety procedures for handling blood or other body fluids (which should be standard for all children in the school or day care setting) would be effective in preventing transmission from children with AIDS to other children in the school.[26]

Guidelines prepared by the Centers for Disease Control and the American Academy of Pediatrics and many state education and health departments have

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[23] *Id.* at 379.

[24] 502 N.Y.S.2d at 336.

[25] 34 C.F.R. § 104.3(j)(2)(iv).

[26] *The Surgeon General's Report on Acquired Immune Deficiency Syndrome*, published by the United States Department of Health and Human Services. *See also*, U.S. Department of Education, *AIDS and the Education of Our Children: A Guide for Parents and Teachers* (1987).

recommended that most children infected with the virus be permitted to attend school.

The EHA and Section 504 both provide that handicapped students are entitled to be placed in the least restrictive educational environment. In particular, Section 504 regulations state that a "handicapped" student is entitled to be placed by a recipient of federal funds: "in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily."[27]

Similarly, a student entitled to special education under the EHA is entitled to be placed in the least restrictive educational environment. The EHA regulations require that the school district or public agency insure:

> (1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and
>
> (2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[28]

In *Ray v. School District of Desoto County*,[29] the United States District Court granted to the parents of three hemophiliac school children preliminary relief prohibiting the school's segregation of the children from a regular school setting by offering separate schooling or homebound instruction.

The three students require injection of blood products. Exposure to HIV most likely occurred prior to 1985 before utilization of present screening and heat treating methods of blood products. As a result of blood injections, testing in August, 1986 discovered that all three children tested seropositive for the AIDS virus.

The parents *voluntarily* shared this information with the school district. The district removed them from the classroom immediately and sent work home. Some time later in the fall of the year, homebound instruction was provided by the school.

Subsequent to removing the students from the classroom, the district consulted with the Florida Department of Health and Rehabilitation Services, the treating physician and other medical consultants. The medical opinions received concluded that the students should be allowed to return to an integrated classroom. Nevertheless, the district offered homebound instruction or "separate but equal full-time isolated instruction." The children attended a court ordered interim program in a segregated class while the motion for preliminary relief was pending. The court recognized that an individual is not considered to have AIDS by testing seropositive for the virus. The Centers for Disease Control defines AIDS for reporting purposes to include those persons afflicted with one or more

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[27] 34 C.F.R. § 104.34(a).

[28] 34 C.F.R. § 300.550(b).

[29] 666 F.Supp. 1524 (M.D. Fla. 1987).

of the opportunistic diseases which takes advantage of the suppressed immune system.

Evidence was presented during the hearing to show that there were incidents of bleeding at the school from the youngsters involved. The court also recognized that there are no medical certainties regarding the transmission of AIDS or the HIV antibodies. In spite of these findings, the court held "these types of problems are better handled by temporary removal from the integrated classroom, if necessary, than by total exclusion from that environment."[50] Testimony was also introduced from an educational physiologist who found that each boy was suffering from emotional distress and educational deficiencies at least in part attributable to their exclusion from a regular educational program. Therefore based on the Rehabilitation Act of 1973 and a state statute, the court held that exclusion from the regular classroom and all the social and educational benefits which flow from such placement constitutes irreparable injury, a requisite for preliminary relief.[51]

It also held that the actual ongoing injury to the students clearly outweighed the potential harm to others.[52] Although the court recognized the concern and fear flowing from the community involved, it recognized that the court may not be guided by such community fear, parental pressure and the possibility of lawsuits.[53]

In its order granting a motion for a preliminary injunction, the court ordered, among other things, that an educational program be provided by the school to the school parent population of the county with the aim of educating and informing them regarding the realities of AIDS and HIV positive victims.

Similarly, a federal court ruling in California, *Thomas v. Atascadero Unified School District*[54] involved a kindergarten student infected with the AIDS virus who was admitted by a placement committee established by district policy to a regular kindergarten class. The first week of school the student was involved in a skirmish with another student and bit the other child's leg. No skin was broken.

The placement committee then recommended that the student be evaluated by a psychologist. The psychologist predicted he would behave "aggressively" in a kindergarten setting, but did not predict he would bite again. The placement committee then decided to keep the child out of school and to provide "home tutoring." The committee considered CDC Guidelines published in August, 1985, which recommend a "more restrictive" environment for infected preschool children who display behavior "such as biting."[55]

In basing its decision to enjoin the district from barring the student from class, the court held that no evidence was presented to show that the student posed a significant risk of harm to other students or teachers. It found that neither available

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[50] *Id.* at 1535.

[51] *Id.* at 1536-37.

[52] *Id.* at 1535.

[53] *Id.*

[54] 662 F.Supp. 376 (C.D. Cal. 1987).

[55] Centers for Disease Control, *AIDS: Recommendations and Guidelines*, (1985).

medical evidence nor the CDC recommendations prove that transmission of the virus is possible by biting. Therefore, based on Section 504 protections, the student was allowed to attend a regular kindergarten class.[56]

In the first reported case upholding the exclusion from school of a child with AIDS, a federal district court judge in *Martinez v. Hillsborough County*,[57] denied the parents' request for preliminary relief to have their child who is infected with HIV, enrolled in a school district's program for trainable mentally retarded students. The judge, in affirming the due process hearing officer's decision, held that the least restrictive environment for the child is homebound instruction.

The child has a measured level of intellectual functioning between 25 and 50, is non-verbal, has a short attention span and has cerebral palsy. Her medical records reveal a history of chronic diarrhea and frequently oozing skin lesions which cover her extremities. The child is neurologically handicapped and lacks control of her body secretions. Pursuant to an adopted school board policy, a multi-disciplinary team, including the medical director from the county health department, a physician specializing in immunology, school personnel, the child's attending physician and the child's mother reviewed the case. The team, utilizing the CDC guidelines and the recommendations from the American Academy of Pediatrics recommended that the child not be placed in the classroom setting with other children, but receive homebound instruction pursuant to an IEP. The physicians, including the former treating physician, were of the opinion that the presence of the child in a classroom setting would create an unacceptable risk of transmission of the AIDS virus to others.

Judge Kovachevich, the same judge who rendered the *Ray* decision held: *"Where, as here, there is any question as to whether the public safety and welfare is threatened, the Court must rule on the side of that public interest."*[58]

AIDS Education

Educating students regarding the issue of AIDS prevention has received attention from many state legislatures. In a survey done by the National Association of State Boards of Education, 17 states and the District of Columbia now mandate that AIDS education take place in schools.[59] This is more than triple the number of states with such a mandate as of June 1987. In addition, 18 other states have engaged in AIDS education non-mandated initiatives.[60]

HEPATITIS

In the late 1970's and early 1980's, considerable legal attention focused on the issue of students who carry the hepatitis B virus. Hepatitis Type B is an inflammation of the liver due to infection with the hepatitis B virus. In most cases, the

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[56] 662 F Supp. at 381-82. *See also*, In re: Ryan W., 1985-86 EHLR Dec. 507:239 (SEA Ind. 1985).

[57] 675 F Supp. 1574 (M.D. Fla. 1987).

[58] *Id.* at 1582 (original emphasis).

[59] *See* School Board News, Volume 7, No. 23, December 23, 1987.

[60] Education Week, December 9, 1987.

inflammation results in a flu-like illness so mild that it is not brought to the attention of a physician. In acute cases the symptoms may last days or weeks.

There are approximately 20,000 reported cases of hepatitis B each year in the United States. The fatality rate is less than 1%. Approximately 5 - 10% of the cases develop chronic infections or carrier status, that is, a person who tests positive for surface e-antigen.[91]

Hepatitis B is transmitted when the body fluids of an infected person contact the body fluids of a susceptible person. Almost all body fluids of an infected person contain infectious viral particles. Blood is the most infectious body fluid and is 100 to 1000 times more infected than saliva.[92] Since 1982, a safe and effective hepatitis B vaccine manufactured from human plasma has been available in the United States.[93]

In *New York State Association for Retarded Children, Inc. v. Carey*,[94] the court held that the segregation of mentally retarded hepatitis B carriers within the public schools constituted unlawful discrimination under Section 504, since similar restrictions were not imposed on non-handicapped student carriers.[95] In addition, the court found that the proposed transfer of these children to more restrictive settings was based on non-educational grounds and therefore violated the rights of children under the EHA and New York Education Law. In issuing an injunction against the proposed segregation, the court held:

> For years the needs of these hepatitis B carrier children were satisfied without objection in special education classes. The needs are the same, but the children are now excluded for reasons which the hearing has shown to be unjustified and which are in direct opposition to the children's needs. The Board's overreaction is not countenanced by the law. . . .
>
> We find that upon taking simple prophylactic and classroom management measures which it is in the Board of Education's power to take, there is no substantial risk of communication of hepatitis B from carrier pupils in the . . . special education programs that justifies their exclusion from the benefits of a public school education, particularly in view of the unavoidable and irreparable harm such exclusion would work on the students involved.[96]

Following the issuance of an injunction by the court and under pressure from parents of non-carrier children, the board formed a task force to devise and implement a plan consistent with health department guidelines recommending segregation within the public schools of hepatitis B carriers. Based on the evidence submitted, the court disputed the board's conclusion that the integration of hepatitis B carriers in special education classes within the public schools posed a significant health risk. The court also held that the medical evidence was sparse

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[91] Association for Retarded Citizens, *Facts about Hepatitis B.*

[92] Kohl v. Woodhaven Learning Center, 672 F Supp. 1226, 1241 (W.D. Mo. 1987).

[93] Centers for Disease Control, *Morbidity and Mortality Weekly Report*, Vol. 36, No. 23, at 353-360 (June 19, 1987).

[94] 466 F Supp. 479 (E.D.N.Y. 1978), *aff'd*, 612 F2d 644 (2d Cir. 1979).

[95] *Id.* at 485-486.

[96] *Id.* at 486.

and failed to demonstrate any causal relationship between the classroom setting and the transmission of the virus.

The court found that the board presented a purely theoretical risk of the spread of hepatitis B predicated upon a philosophical concept of causation. The board was not able to demonstrate even one instance of transmission of the disease within the classroom setting.

In *Community High School District No. 155 v. Deutz*,[47] the Appellate Court of the Second District of Illinois, affirmed the trial court's decision stating that the appropriate educational placement of a trainable mentally retarded child with Downs Syndrome who although being totally asymptomatic, is also a carrier of hepatitis B, was a classroom setting. The court rejected the district's proposal of "homebound" instruction.[48]

Two multidisciplinary conferences were held with both determining that the student's educational needs could be appropriately met in a classroom setting. The court affirmed the decision finding that since the student is entitled to be placed in the least restrictive environment under the EHA, the injury to . . . the student, if isolated from her peers, outweighs the risk of possible transmission of the disease.

A more recent federal ruling in *Kohl v. Woodhaven Learning Center*[49] held that an applicant to a life skills and vocational residential facility who was an active carrier of hepatitis B and who exhibited behavioral problems including biting and scratching was an "otherwise qualified" handicapped person under Section 504. The attempted exclusion of the student from the program therefore violated Section 504. Inoculation and screening of staff assigned to work directly with him, costing an estimated $6,500, was found to be a required "reasonable accommodation."[50]

Unlike these decisions, the U.S. District Court in Maryland in *Ely v. Howard County Board of Education*,[51] denied the parents' motion for preliminary relief seeking to keep their youngster in a public school special education program. In *Ely*, the plaintiff child was mentally retarded with severe learning disabilities who attended a special education program for the learning disabled. The evidence was undisputed that he was the carrier of the hepatitis B viral antigen. The evidence was also undisputed that the child was presently living in a group home and that a resident of the group home had contracted hepatitis B apparently from the student. In this case the court held that those most knowledgeable about hepatitis B agree that saliva carries the virus and that contact with the mucous membranes carries a high risk of transmission.[52] This student, in his present school setting, frequently placed his hands and fingers of the staff in his mouth resulting in frequent contact with saliva.

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[47] 124 Ill. App. 3d 129, 463 N.E.2d 998 (1984).

[48] 463 N.E.2d at 1003-04.

[49] 672 F.Supp. 1226, 1238-48 (W.D. Mo. 1987).

[50] *Id.* at 1246-48.

[51] 1981-82 EHLR 553:288 (D. Md. 1982).

[52] *Id.* at 553:289.

The court held that hardship and injury to the student was of a lesser magnitude than the hardship or injury which the staff, the other students and volunteers at the special education program would suffer in the event they contracted hepatitis B.[53] In line with this holding, a California special education hearing officer in *In re: Santa Clara County Superintendent of Schools,*[54] issued a decision regarding a 18 year old girl who was blind, deaf, and profoundly retarded. She was multihandicapped and eligible for special education under the EHA. She was also determined to be a carrier of the hepatitis B antigen. She was a full-time resident of a state hospital, but attended a special education program in the county public schools. When it was determined that she was a carrier of hepatitis B, she was removed at the request of the school staff and attended the school on the grounds of the state institution.

The special education state reviewing officer found that the county public school program was the appropriate placement in order to meet her educational needs. However, because her behavior was such that she was much more likely to transmit the hepatitis B virus than would a person of higher cognitive functioning, the reviewing officer held that the public school may exclude her because of the risk of communicating the hepatitis B virus. Her behavior included routinely mouthing objects and toys within her reach, her inability to independently wash her hands, toilet herself or wipe her nose, *etc.*

In a surprising decision, the Office for Civil Rights (OCR) of the United States Department of Education held that a private preschool program for handicapped children receiving federal education funds could refuse to admit a child who is an asymptomatic carrier of hepatitis B.[55] OCR held that there was no violation of Section 504 since the regulations prevent OCR from requiring a private program to admit a handicapped child if the child's participation will necessitate "more than minor adjustments" in the manner in which the program is normally offered.[56]

In interpreting the extent of the necessary accommodations for this child, OCR determined, "a health risk to other children that is posed by a child who may spread a contagious disease is a legitimate consideration." It was also found that the private school itself was in the best position to decide what adjustments would be necessary and therefore OCR accepted the judgment of the private school.

HERPES SIMPLEX VIRUS

There are two types of the herpes virus. HSV-I occurs mainly in childhood and is transmitted orally by direct contact with infected secretions. HSV-II, also known as genital herpes, usually is transmitted through sexual contact. Both types of herpes are evidenced by lesions on the infected person's body. The risk of transmission is greatest when there are visible or active lesions.

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[53] *Id.*

[54] 1981-82 EHLR 503:252 (SEA Ca. 1982).

[55] St. Peter's Child Development Center (PA), Complaint No. 03861097, EHLR 352:479.

[56] *See* 34 C.F.R. § 104.39.

In *McKay v. Board of Education of Anne Arundel County*,[97] the court ordered that a preschool child with herpes be allowed to attend school when no lesion is present on the child's hands, or when a lesion has opened and then has crusted over. The court ordered that a nurse trained to recognize the symptoms of herpes examine the child each day before allowing the child to enter the classroom. Should the nurse find active lesions on the child's hands, the child would be returned home. Otherwise, the child was required to wear a one-piece jumpsuit or similar clothing to prevent the transmission of the disease while attending school.

POLICY CONSIDERATIONS

As a "preventive law" practice, it is important to conduct a periodic review of existing school district policies in light of new educational, legal and other relevant developments. This is especially so with a communicable disease policy based on evolving scientific and medical information. Perhaps, it is also timely to review or develop such a policy in anticipation of and not as a reaction to an issue should it arise. At least one court noted that the district's policy on attendance of students with communicable diseases was adopted *after* a student with AIDS attempted to enroll. "The policy appears to be more an ad hoc reaction to Plaintiff's case than a well-established plan promulgated by the district," the *Doe* court observed.[98]

Based on a review of guidelines developed by the Centers for Disease Control and the American Academy of Pediatrics and a review of several policies,[99] consideration of the following factors in developing a communicable disease policy is recommended:

- provision for a case-by-case analysis of each student's situation instead of a blanket admission/exclusion policy
- a procedure encompassing a team approach in making decisions regarding student attendance and placement.
  Team composition may include:
  —public health personnel
  —student's physician
  —parent/guardian
  —appropriate school personnel to be determined by the Superintendent
  —epidemiologist/infectious disease consultant
  —school nurse/physician
- criteria to be considered by the team regarding student attendance should include:
  —student age
  —student behavior
  —physical condition

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[97] Civil Action No. 3106815, (Cir. Ct. Anne Arundel County, Md. 1985).

[98] 672 F.Supp. at 345.

[99] Policies were reviewed from Pennsylvania, Florida, Minnesota, Connecticut, Oregon, Missouri, California and Vermont; American Academy of Pediatrics, *Report of the Committee on Infectious Diseases* (1986); *AIDS: Recommendations*, *supra*, note 35.

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- [illegible]
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U.S. Tax Policy: Will State and Local Governments Pay the Bill?

By: Katherine L. Barbieri

INTRODUCTION

Historically, the federal Congress has refrained from enactment of legislation to tax or inhibit the financial activities of state and local governments. In turn, confident that Congress would insulate their activities from direct federal intervention, these units of government felt free to restrict their analysis of federal tax legislation to the impact it would have on their own ability to impose and collect taxes. Nevertheless, a review of recent federal tax legislation and regulatory action might well lead one to conclude that state and local governments may no longer rely on Congress to protect their interests. If this is so, these governments must expand their review of federal tax laws beyond that of a tax collector to include that of a taxpayer. This is so for three reasons.

First, beginning with the Tax Equity and Fiscal Responsibility Act of 1982[1] (TEFRA) and in each succeeding tax bill thereafter, provisions were proposed to: impose a direct tax on the financial transactions of state and local governments; or restrict the access of state and local governments to income generating activities theretofore available to them; or diminish the attractiveness to potential sellers, investors, and brokers of doing business with a state or local government.

Secondly, experience suggests that because the stakes in tax legislation are so high, and the interests competing for favorable tax treatment so many, that no taxpayer can abstain from any stage of the legislative or regulatory process and be assured that he will not be penalized. This is particularly true in the case of state and local governments.

The income producing activities undertaken by these governments, and the financial transactions they enter into are both unique and generally unavailable to the private sector. As a result, the interests of these governments are not necessarily compatible with or shared by any other group. Thus, should state and local governments absent themselves from the federal tax process, they can only be assured that their interests will be both unrepresented and unprotected.

Finally, the existence of a burgeoning federal debt has had a significant impact on the formulation and direction of U.S. tax policy. In that regard, the congressional tax writing committees have reached an agreement in principle. That

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[1] Codified at scattered sections in Titles 26, 28, 42 and 49 of the United States Code.

[redacted]

[redacted]

[redacted]

passes to the federal agency with jurisdiction over the subject matter (e.g., the Treasury Department has jurisdiction over tax legislation).

Regulatory Process

Normally, one would be entitled to assume that the content of regulations could be accurately inferred by a thorough reading of the statutory language. However, this is not necessarily the case because agencies will draw inferences from the *absence* of certain language in the statute. In those situations, the regulatory result becomes less predictable. This is so because the agency will reach beyond the statute in an attempt to ascertain the intent of Congress by enactment.

Traditionally, a federal agency which seeks to establish the legislative intent of Congress in regulations is restricted to two sources beyond the statute. Those sources are the Conference Report[5] and the legislative history.[6] However, the Treasury Department has a third source which it may reference at its option.

Unlike all other federal legislation, the staff of the Joint Tax Committee has a unique opportunity to expand upon the intent of Congress, as enunciated in the Conference Report and the legislative history, long after a bill has become law. That extra-legislative opportunity is the "Blue Book," a publication originally intended to elucidate, for taxpayers and Treasury, many of the more complex and innocuous provisions contained in tax legislation.

Nevertheless, for taxpayers, the Blue Book is often more a curse than a blessing. This is so because a staff publication does not have the force and effect of law. Thus, Treasury may choose to disregard those guidelines which are favorable to taxpayers, but which may not adhere to Treasury's policy of strict statutory interpretation. Alternatively, Treasury is free to rely on other explanations (in the same publication) which restrict taxpayers far beyond a "reasonable person's" reading of the new law.

Moreover, in general, the Treasury does not publish proposed regulations. Rather, the Internal Revenue Service (IRS) publishes guidance to taxpayers in the form of a notice. By that notice, the IRS announces both its interpretation of particular provisions in the new legislation and the manner in which it intends to regulate that interpretation. Final IRS regulations are routinely predicated on a notice, and are often not preceded by the traditional rulemaking process.

Additionally, as discussed previously herein, the IRS draws inferences from the absence of certain language in a statute, or may rely on extra-legislative staff annotations contained in the Blue Book to substantiate its position. In either case, unless the IRS determines that a retraction is appropriate, legislation is the only remedy available to an affected taxpayer.

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[5] The purpose of the Conference Report is twofold. First, it summarizes the specific substantive areas of agreement and disagreement between the original Senate and House passed bills. Secondly, it provides a detailed analysis of how and why those differences were resolved in the final bill.

[6] The legislative history is a compendium of formal actions taken by the committee on the bill (i.e., the transcript of hearings on the bill, statements submitted for the record, votes of committee members recorded during mark-up, etc.), as well as any action taken on the bill while it was on the floor of both houses of Congress.

Technical Corrections Bill

The first opportunity for a taxpayer to obtain remedial legislation is in the technical corrections bill. The purpose of a technical corrections bill is to provide a legislative vehicle to allow Congress an opportunity to do what it believed it had done the first time. Nevertheless, the advent of revenue-driven tax legislation has seriously undermined the ability of affected taxpayers to obtain a provision in the technical corrections package if it results in decreased revenues to the federal treasury.

The irony of this approach to technical corrections has not been lost on the taxpayers seeking these corrections. After all, they argue, if the impact on the taxpayer was indeed unintended, then the revenue generated by the mistake should not be considered a revenue loss. Unfortunately, the tax writing committees have chosen to address the unintended impact/revenue generating provisions by the addition of another section to the technical corrections bill: the miscellaneous provisions.

The inclusion of unintended impact/revenue generating provisions in the miscellaneous section of a technical corrections bill at once increases the complexity of obtaining a taxpayer remedy and decreases the chances that they will be successful. Taxpayers must now argue that their provision be included in the bill as a technical correction, rather than as a miscellaneous provision. Furthermore, division of the bill into provisions which are revenue neutral and those which are revenue losing provides Congress with an opportunity to sever the latter from the final technical corrections bill prior to passage.

THE FEDERAL TAX PROCESS IN PRACTICE

More than six months following passage of the Tax Reform Act of 1986,[5] the staff of the Joint Committee on Taxation published the *General Explanation of the Tax Reform Act of 1986* ("Blue Book"). Following publication of the Blue Book, the IRS moved quickly to announce its intent to interpret certain provisions in the Tax Reform Act of 1986 in a manner which undermined the prudent fiscal operation and management of many state and local governments across the country.

Because the position of the Service was not wholly without merit (the broad interpretations enunciated by the IRS were based on a staff footnote in the Blue Book and a failure by the tax writing committees to consider all possible ramifications of their actions), the only remedy available to units of state and local government lay in passage of the Technical Corrections Act of 1987.

Provisions both to clarify the narrow intent of Congress by enactment and to restrict the regulatory authority of the IRS were obtained in the miscellaneous provisions of the technical corrections bill. Although the technical corrections package was subsequently attached to the Budget Reconciliation Act of 1987,[6] in the wake of the White House/congressional budget summit, it was severed from the reconciliation bill which became law in December 1987.

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[5] Codified at scattered sections in Titles 16, 19, 25, 26, 29, 42 and 49 of the United States Code.

[6] Pub. L. No. 100-203, 101 Stat. 1330 (Dec. 22, 1987).

Absent passage of the technical corrections package, the IRS remains free to act in a manner consistent with its previous interpretations, and inconsistent with the prudent fiscal operation and management of local public school systems.

Staff Footnote as the Basis of Regulation Beyond the Scope of the Statute (Tax and Revenue Anticipation Notes [TRANs])

In response to publication of the Blue Book, the IRS issued Notice 87-42. The Notice provides that the Service intends to interpret a Blue Book footnote (footnote 173, relating to the safe harbor exception to the arbitrage rebate restriction on tax and revenue anticipation notes), as a requirement that states and localities (including local school districts)[*] include funds in accounts dedicated for specific use in the calculation of cash assets to determine the extent of the cash flow deficit.

As a practical matter, enforcement of the Notice would not only preclude the majority of local school districts from access to the safe harbor rebate rule, but it simultaneously disregards the viability of the underlying transaction (issuance of a tax and/or revenue anticipation note is predicated on the existence of a deficit).

Several members of the Senate Finance Committee, sympathetic to the concerns of state and local governments, took action to rectify the damage occasioned by staff footnote 173. By October's end, the Finance Committee had agreed to include a provision in the technical corrections bill both to clarify that Congress intended a less restrictive result than that postulated in the Blue Book and to compel the IRS to follow traditional rulemaking procedures (i.e., hearings and public comment) prior to adoption of final regulations governing TRAN arbitrage.

Severance of the technical corrections package from the budget reconciliation forestalled action on the provision. Nevertheless, state and local governments learned two important facts by their participation in this process.

First, congressional members did not unilaterally seek to clarify staff footnote 173, nor did they independently oppose IRS promulgation of Notice 87-42. Rather, a minority of congressional members responded favorably to persistent complaints by a minority of their constituents. The message is irrefutable. The majority of Congress not only acquiesced to the substance of footnote 173, it was inclined to agree with the IRS' intended result of Notice 87-42.

Secondly, and perhaps more importantly for TRAN issuers, is the dual nature of the restrictive language contained in footnote 173. That language not only restricts the ability of a TRAN issuer to retain arbitrage profits under the safe harbor rebate rule, it defines the underlying transaction, notwithstanding state law to the contrary. Thus, in future tax legislation, the language which currently restricts TRAN issuer access to the safe harbor rebate rule could also serve as a restriction on the issuance of a TRAN.

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[*] The annual TRAN volume issuance of local public school districts is more than twice that of any other state or local governmental unit.

Silence in Legislation Spawns Regulation (Employee Benefits—Section 457 Nonelective Deferral of Income)

Originally enacted as part of the Revenue Act of 1978, section 457 was an attempt to clarify that state and local government employers could provide nonqualified deferred compensation plans to their employees free of taxation until actually received by the employee. At the time of enactment, it appeared that section 457 applied to elective deferrals of income only. In fact, at no time following enactment of section 457 did the IRS publicly take the position that it was applicable to nonelective forms of deferred compensation.

The Tax Reform Act of 1986 extended application of section 457 to tax-exempt organizations. Following passage of the Act, the IRS issued Notice 87-13 in which the Service, for the first time, stated that section 457 would henceforth apply to both elective and nonelective forms of deferred compensation. Moreover, the Notice went on to opine that nonelective income deferrals would include certain vacation and sick leave plans, supplemental retirement plans and employment contracts.

In October 1987, the House Ways and Means Committee agreed to add a provision to the technical corrections package which would clarify that it was not the intent of Congress that certain vacation and sick leave plans, supplemental retirement plans, and employment contracts be considered nonelective income deferrals under section 457. However, the Committee was not inclined to overrule the Service's intention to apply section 457 to both elective and nonelective income deferrals.

Following severance of the technical corrections from the budget reconciliation, the IRS withdrew that portion of Notice 87-13 which applied to vacation and sick leave plans, supplemental retirement plans and employment contracts. Nevertheless, the Service did not withdraw from its original legal position that as a matter of law, all nonelective income deferrals may be subject to section 457.

CONCLUSION

Congress and the Treasury Department have served notice of their intent to focus on the financial transactions and income producing activities of state and local governments. Moreover, because the direction of both the tax writing committees and the Treasury is driven by the need to generate federal revenues, state and local governments should expect that federal scrutiny of their activities will increase over the next decade.

These units of governments and their representatives must, therefore, become active participants in both the formulation of federal tax policy and the enunciation of that policy by legislation and regulation. If they do not, the cost of U.S. tax policy will be underwritten by state and local governments.

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